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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1464

THE UNIVERSITY OF CHICAGO AND ARGONNE,
A CORPORATION,
Petitioner,

vs.

LOUIS ALLEN McDANIEL, JR.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner, The University of Chicago and Argonne, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this case on January 21, 1977.

OPINIONS BELOW.

The latest opinion of the Court of Appeals in this case is reported at 548 F. 2d 689 (7th Cir. 1977) and is reproduced herein as Appendix B. The previous opinion of the Court of Appeals, which was vacated and remanded by this Court for further consideration, 423 U. S. 810 (1975), is reported at 512 F. 2d 583 (7th Cir. 1975) and is reproduced herein as Appendix E. The Memorandum of Decision of the District Court is unreported, but is printed in its entirety as Appendix F hereto.

JURISDICTION.

The opinion and judgment of the Court of Appeals was entered on January 21, 1977.[1] On February 14, 1977, pursuant to Petitioner's motion, the Court of Appeals stayed the issuance of its mandate for a period of thirty days. Thereafter, on March 16, 1977, that stay order was extended to April 22, 1977.[2] This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED.

Whether the Seventh Circuit, in adhering to its original decision that Section 1 of the Davis-Bacon Act, 40 U. S. C. § 276a, gives rise to an implied private right of action in addition to the cause of action expressly provided by Section 3(b) of the Act, 40 U. S. C. § 276a-2(b), correctly interpreted the mandate of this Court to consider the case in light of *Securities Investor Protection Corp.* v. *Barbour*, 421 U. S. 412 (1975), and *Cort* v. *Ash*, 422 U. S. 66 (1975).

STATUTORY PROVISIONS INVOLVED.

Sections 1 and 3 of the Davis-Bacon Act, as amended (40 U. S. C. § 276a *et seq.*) and Section 1 of the Miller Act, as amended (40 U. S. C. § 270a *et seq.*) are applicable to this case and are reproduced verbatim as Appendix F hereto.

1. The opinion and judgment of the Court of Appeals are printed as Appendix B hereto.

2. The orders staying issuance of the mandate are printed as Appendices C and D hereto.

STATEMENT OF THE CASE.

This is an action to recover wages allegedly owing under the provisions of the Davis-Bacon Act to Respondent and a class he purports to represent. Respondent alleges that he was employed as a mechanic or laborer on a government construction project at the Argonne National Laboratory (Argonne) pursuant to a contract entered into between Argonne and the United States Atomic Energy Commission (AEC), now the United States Energy Resource Development Agency (ERDA), that the Davis-Bacon Act was applicable to the contract, and that Petitioner failed to pay him the prevailing wages to which he alleges the Secretary of Labor had determined he was entitled.[3] The action is alleged to arise "under one or more laws regulating Interstate Commerce," and Respondent claims that federal "jurisdiction of this action is predicated upon 28 United States Code, Sections 1331 and 1337, among others, and under the Davis-Bacon Act, Title 40 United States Code, Section 276a."[4]

Petitioner moved to dismiss, contending, *inter alia*, that the Davis-Bacon Act does not admit of a private right of action other than that expressly granted under Section 3(b) of the Act, 40 U. S. C. § 276a-2(b), which establishes a cause of action by an aggrieved employee against the contractor's bond under the Miller Act, 40 U. S. C. § 270b.

On March 12, 1973, the District Court for the Northern District of Illinois (Honorable Philip W. Tone) granted Petitioner's motion and dismissed the Complaint, ruling that Respondent had failed to state a cause of action upon which relief could be granted and that the Court's jurisdiction could not properly be invoked under the Davis-Bacon Act.[5] In so ruling, the Court reasoned

3. Complaint, Paras. II-IV.
4. Complaint, Para. I.
5. App. F, p. A27.

that the one right of action specifically provided under the Davis-Bacon Act was exclusive and that:

> "[T]here is no way to avoid the thrust of the statute's language and legislative history in delimiting the right of action to one which Congress felt would be adequate to protect employees whose contractors failed to pay them the wages prescribed by the statute."[6]

The Seventh Circuit reversed and remanded the case to the District Court for further proceedings. In an opinion[7] by Chief Judge Thomas E. Fairchild, in which Circuit Judge Swygert and Circuit Judge Sprecher concurred, the Court reasoned that even though "the terms of § 276a-2(b) do not create a cause of action, cognizable in federal court, for one in (Respondent)'s position,"[8] other related statutes evidence congressional recognition that "wage earners have or may have rights of action under the contractual provisions required by § 276a which may be enforced in state court actions or federal court actions where jurisdiction is properly based."[9] Concluding that the remedial scheme expressly provided by Congress had "proved ineffective," the Court searched elsewhere for a jurisdictional predicate for Respondent's action.[10] Against this background, and spurred on by what it considered to be the mandate of this Court in *J. I. Case Company* v. *Borak*, 377 U. S. 426 (1964), and *Allen* v. *State Board of Elections*, 393 U. S. 544 (1969), the Seventh Circuit decided that a sufficient nexus exists between the Davis-Bacon Act and the commerce clause to found subject matter jurisdiction for this implied private right of action on 28 U. S. C. § 1337.[11]

6. App. F, p. A26.
7. Hereinafter sometimes referred to as *McDaniel I*.
8. 512 F. 2d at 585; App. E, p. A18.
9. 512 F. 2d at 586; App. E, p. A20.
10. 512 F. 2d at 587; App. E, p. A20.
11. 512 F. 2d at 587; App. E, p. A22.

On October 6, 1975, this Court entered its order granting review of the Seventh Circuit's decision and summarily remanding the case for further consideration as follows:

> "The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Seventh Circuit for further consideration in light of *Securities Investor Protection Corp.* v. *Barbour*, 421 U.S. 412 (1975) and *Cort* v. *Ash*, 422 U.S. 66 (1975)." 423 U. S. 810 (1975); App. A, p. A1.

Subsequently, on November 19, 1975, the Seventh Circuit issued an order, *sua sponte*, for the filing of supplemental briefs addressed to the question of any action called for by this Court's mandate.

The Seventh Circuit's opinion on remand[12] was issued on January 21, 1977. After reviewing the decisions in *Securities Investor (SIPC)* and *Cort*, *supra*, pursuant to this Court's mandate, and additionally considering *National Railroad Passenger Corporation* v. *National Association of Railroad Passengers (Amtrak)*, 414 U. S. 453 (1974), the Seventh Circuit concluded that:

> "[I]mplying a private right of action in the Davis-Bacon Act is necessary to effectuate the intention of Congress in passing the statute."[13]

Persisting in its perception that ". . . this case is a good example of how the governmental remedies specifically provided in the Act can be ineffective . . ."[14] the Court adhered to its holding in *McDaniel I* implying a private right of action in federal court under the Davis-Bacon Act.

12. Hereinafter sometimes referred to as *McDaniel II*.
13. 548 F. 2d at 695; App. B, p. A12.
14. 548 F. 2d at 694; App. B, p. A11.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI.

I.

THE PROPER CONSTRUCTION OF THE DAVIS-BACON ACT IS AN IMPORTANT FEDERAL QUESTION WHICH SHOULD BE PROMPTLY AND DEFINITIVELY RESOLVED BY THIS COURT.

A. The Seventh Circuit's Opinion on Remand Misconstrues This Court's Mandate and Conflicts with Recent Decisions of This Court.

In its first decision in this case, *McDaniel I*, the Seventh Circuit ruled that Section 1 of the Davis-Bacon Act gives rise to an implied private right of action in federal district court.[15] This Court vacated that judgment and remanded the case for consideration in light of *SIPC* and *Cort*.[16] On remand, in *McDaniel II*, the Seventh Circuit tenaciously adhered to its original judgment that there should be a private right of action under the Act,[17] notwithstanding the strict test for implication of such remedies established by this Court in *SIPC* and *Cort*.

Although the Court of Appeals paid lip service to those two opinions, and made passing reference to *Amtrak*, *supra*, the Court's opinion in *McDaniel II* essentially echoes the deficient analysis of *McDaniel I* which was premised upon the different standards and line of reasoning set forth in *J. I. Case* and *Allen*, *supra*. Despite the obvious limitations *SIPC* and *Cort* impose upon the *J. I. Case-Allen* theory that a judicial remedy should be implied whenever the statutory remedies prove "ineffective," the Seventh Circuit has once again concluded that private litigation under the Davis-Bacon Act should be allowed. In essence, the Court has ruled that *SIPC* and *Cort* do not mandate a different result than that reached in *McDaniel I*. We respectfully disagree.

15. 512 F. 2d 583 (7th Cir. 1975); App. E, p. A15.
16. 423 U. S. 810 (1975); App. A, p. A1.
17. 548 F. 2d 689 (7th Cir. 1977); App. B, p. A2.

It has been clear since *Amtrak*, *SIPC* and *Cort* that more than mere ineffectiveness of the remedies established by Congress is required before federal court remedies will be implied.[18] Nonetheless, in *McDaniel II*, it is clear that the Seventh Circuit was guided once again by its perception of the adequacy of the remedies available under the Act. In *McDaniel II*, the Court stated as follows:

> "This case is a good example of how governmental remedies specifically provided in the Act can be ineffective in accomplishing the congressional purpose.
>
> • • • • •
>
> "[W]e hold that implying a private right of action in the Davis-Bacon Act is necessary to effectuate the intention of Congress in passing the statute." 548 F. 2d at 694, 695; App. B, pp. A11-A12.

This language compares with *McDaniel I*, where, relying upon this Court's earlier decisions in *J. I. Case* and *Allen*, the Court reasoned:

> "In a case in which the express remedies provided . . . have proved ineffective, we should be especially 'alert to make effective the congressional purpose.'" (Citations and footnote omitted.) 512 F. 2d at 587; App. E, pp. A20-A21.

18. This Court's recent decisions in *Piper* v. *Chris-Craft Industries, Inc.*, ... U. S. ....., 97 S. Ct. 926 (1977), and *Santa Fe Industries, Inc.* v. *Green*, ... U. S. ....., 45 U. S. L. W. 4317 (Mar. 23, 1977), although not directly applicable herein, clearly signal this Court's continued close scrutiny of the judicial implication of rights of action in federal court. In *Piper*, this Court, in overturning a unanimous Second Circuit decision, held that an unsuccessful tender offeror has no implied cause of action for damages under Section 14(e) of the Securities Exchange Act of 1934, 15 U. S. C. § 78n(e). Similarly, in *Green*, this Court refused to extend the implication of a private right of action under § 10(b) of the Securities Exchange Act to an alleged breach of corporate fiduciary duty. In each case this Court applied the principles set down in *Cort*, *supra*.

Obviously, the Seventh Circuit has continued its reliance on the *I. I. Case-Allen* analysis despite this Court's admonition to heed the strict criteria of *SIPC* and *Cort*. In its apparent zeal to find an implied judicial remedy for Respondent herein,[19] the Seventh Circuit has strained to distinguish *SIPC* and *Cort* and as a result has not properly applied those carefully established standards to the instant case.

B. In Its Opinion on Remand the Seventh Circuit Has Misconstrued and Misapplied the SIPC-Cort Criteria.

Close examination of *McDaniel II* reveals that the Seventh Circuit has completely misconstrued and misapplied this Court's decisions in *SIPC* and *Cort*. After reviewing those cases and this Court's decision in *Amtrak*, the Court distilled four criteria for determining whether a federal private right of action should be implied in a particular case:

> "First, we must determine whether a laborer like the members of the plaintiff class is the "especial' beneficiary of the Davis-Bacon Act. . . . Second, we must determine whether the legislative history or the language of the act itself reveals a congressional intent to deny a private right of action. . . . Third, we must determine whether a private right of action in this case would be necessary or even capable of effectuating the purpose of the Act. . . . Finally, we must consider whether the cause of action is one traditionally relegated to state law."[20]

19. This apparent disposition of the Seventh Circuit to create new causes of action in federal court where none have been provided by Congress has led the Court to a similar conclusion in a recent case. In *Lloyd* v. *Regional Transportation Authority*, ... F. 2d ....., 45 U. S. L. W. 2371 (7th Cir. 1977), which was decided three days prior to *McDaniel II*, the Seventh Circuit, in reversing a district court order of dismissal, held that there is an implied private cause of action available under Section 504 of the Rehabilitation Act of 1973, 29 U. S. C. § 794. The consistency of the Seventh Circuit's view with respect to judicial implication accentuates its apparent disagreement with this Court's decisions in *Amtrak*, *SIPC*, *Cort*, *Piper* and *Green*, *supra*.

20. 548 F. 2d at 692; App. B, pp. A6-A7.

In its selection of these four criteria, the Court merely parrots the four-part test enunciated in *Cort* with the notable exception of the third part, which has been significantly changed. The third element of the analysis in *Cort* is as follows:

> "[I]s it *consistent with the underlying purposes* of the legislative scheme to imply such a remedy for plaintiff?" (Emphasis added.) 422 U. S. at 66.[21]

By replacing the *Cort* criterion with the substantially different standard, ". . . necessary or even capable of effectuating the purpose of the Act," the Seventh Circuit has eliminated the necessity to analyze the underlying (and possibly competing) purposes and the administrative scheme surrounding the Act as required by *Amtrak*, *SIPC* and *Cort*. For example, in *Amtrak*, this Court reviewed the overall purposes of the Amtrak Act and noted that permitting private lawsuits under the Act would "completely undercut the efficient apparatus that Congress sought to provide" since "there would be a myriad of possible plaintiffs" and "the potential would exist for a barrage of lawsuits."[22] In *SIPC*, this Court found that the primary purpose of the Act was the protection of investors. However, the Court went on to carefully review and analyze the scheme established by Congress to effectuate that designated purpose. Noting that Congress "created a corporate entity to solve a public problem,"[23] this Court examined the administrative scheme for supervision of its operations and concluded:

> "[A]s in Amtrak, it is clear that the overall structure and purpose of the SIPC scheme are incompatible with such an implied right." 421 U. S. at 421.

21. This test has its origins in *Amtrak*, where this Court recognized that "the inference of . . . a private cause of action not otherwise authorized by the statute must be consistent with the evident legislative intent and, of course, with the effectuation of the purposes intended to be served by the Act." *Amtrak*, *supra*, 414 U. S. at 457-458. This principle was reaffirmed in *SIPC*, 421 U. S. at 418, and finally incorporated as the third part of the four-part *Cort* test.

22. 414 U. S. at 463.

23. 421 U. S. at 420.

In spite of these clear statements, the Seventh Circuit's interpretation of these cases reduces the *Cort* analysis to a simple search for the principal beneficiaries of the Act. Under *McDaniel II*, whenever the "especial" beneficiaries are the overriding concern, a private remedy is necessarily "capable of effectuating the purpose" of the Act even though it might not be "consistent with its underlying purposes." Furthermore, if it is found that the statutory remedies are "ineffective," as the Seventh Circuit found in the instant case, then the implied remedy becomes "necessary."

The Seventh Circuit did not consider the effect the creation of a private right of action would have on the carefully balanced program for administrative cost control of federally funded contracts by contracting agencies. This correlative purpose of the Davis-Bacon Act has been recognized by this Court. *United States* v. *Joseph A. Holpuch Co.*, 328 U. S. 234, 239 (1946); *United States* v. *Blair*, 321 U. S. 730, 734 (1944). The Seventh Circuit recognized the variety of reasons for which Davis-Bacon was passed:

> "(a) that local contractors be protected from unfair competition; (b) that local craftsmen not be denied work by contractors who recruited labor from distant cheap labor areas; and (c) that local communities not lose the working ability and purchasing power of their citizens."[24]

However, the Court disposed of these correlative purposes of the Act in terms of its "principal beneficiaries" analysis:

> "But for the plaintiff class to be the special beneficiaries does not mean that they must be the exclusive beneficaries; that local contractors and communities may benefit from the Act does not mean that it was not principally directed toward the laborers and mechanics."[25]

The Court simply ignored the overall scheme of the Act in its analysis of the third criterion of the *Cort* test. Similarly, the

24. 548 F. 2d at 692-693; App. B, p. A7.
25. 548 F. 2d at 693; App. B, p. A7.

underlying purposes of the Act were ignored by the Court. In this regard the Seventh Circuit misapplied the *SIPC-Cort* criteria and for this reason misconstrued the legislative history of efforts to amend the Davis-Bacon Act to specifically provide a private right of action in federal court.

The Seventh Circuit's distortion, in *McDaniel II*, of the third element of the *Cort* test also skewed the Court's analysis of the legislative history of the Act. Because its attention was focused on the overriding purpose and intended beneficiaries of the Act, the Court cavalierly disregarded compelling legislative history revealing an intention of Congress to *deny* a private right of action under the Act. In its decision on remand, the Court quoted from congressional comment at the time of the Act's passage[26] as to the intended beneficiaries of the legislation, but summarily dismissed Petitioner's reference to the legislative history surrounding the defeat of Congressman Goodell's bill, H. R. 9590, 88th Cong., 2d Sess. (1964), which would have explicitly granted the right of action sought by Respondent herein, as "not even remotely at issue in this case."[27]

The Seventh Circuit's examination of this case is deficient because of its misunderstanding of what this Court said in *SIPC* and *Cort*. It is not enough that there be a special beneficiary under a statute. The examination must go further and the manner in which Congress intended the statute to be enforced must be reviewed. The respondent in *Amtrak*, for example, had claimed that railroad passengers were the intended beneficiaries of the Act and that courts should therefore imply a private cause of action whereby they could enforce compliance with the Act's provisions. The respondent in *SIPC* made similar claims. In both cases, this Court's answer was the same:

> "The respondent contends that since the SIPA does not in terms preclude a private cause of action at the instance of a member broker's customers, and since such customers and the intended beneficiaries of the Act, the Court should

26. 548 F. 2d at 693; App. B, p. A8.
27. 548 F. 2d at 694; App. B, p. A10.

> imply a right of action by which customers can compel the SIPC to discharge its obligations to them. As we said only last Term in analyzing a similar contention: 'It goes without saying . . . that the inference of such a private cause of action not otherwise authorized by the statute *must be consistent with the evident legislative intent* and, of course, with the effectuation of the purposes intended to be served by the Act.' *Passenger Corp.* v. *Passenger Assn.*, 414 U.S. 453, 457-458 (1974). . . ." (Emphasis added.) 421 U. S. at 18.

The Seventh Circuit's opinion in *McDaniel II* fails to consider the impact of a private right of action on the overall purposes of the Davis-Bacon Act. It is submitted that the Seventh Circuit's opinion frustrates the clear congressional policy of ensuring the efficient administration of federally funded Davis-Bacon Act projects. In this regard, the Seventh Circuit's decision herein is inconsistent with this Court's decision in *SIPC* and *Cort* and, accordingly, should be set aside.

C. The Proper Construction of the Davis-Bacon Act Will Be A Threshold Jurisdictional Issue in Other Federal Cases.

By virtue of the Seventh Circuit's decisions in the *McDaniel* case, federal district courts have been, for the first time since the passage of the Davis-Bacon Act, available to private litigants for the filing of individual or class action suits under the Act. Having swept aside the administrative controls and procedures established under the Act, the Seventh Circuit has invited potential plaintiffs to proceed directly to federal court to resolve questions of coverage, classification and rates under the Act. It is submitted that the potential for a flood of federal court litigation flowing from these novel and wholly unprecedented interpretations of the Davis-Bacon Act is real.[28] Each such

28. In our earlier Petition to this Court, we noted the case of *Stanley E. Coutu* v. *Universities Research, Inc.*, Case No. 75 C 1129 (N. D. Ill.), which was filed on April 9, 1975, less than a month after the issuance of the Seventh Circuit's opinion in *McDaniel I*. In that case, the plaintiff and a class he purports to represent seek

(Footnote continued on next page)

action will raise the threshold jurisdictional question of whether or not there is an implied private right of action in federal district court under the Davis-Bacon Act.

Petitioner submits that the proper interpretation of the Davis-Bacon Act is an important federal question which is now ripe for decision and which should be definitively resolved by this Court. Since the issue raised herein will be a threshold question in future federal district court cases which will be complex, time-consuming and expensive, the interests of judicial economy and fairness to all parties militate in favor of a prompt resolution of the issue by this Court.

II.

THE DECISION OF THE SEVENTH CIRCUIT ON REMAND SERIOUSLY MISCONSTRUES THE DAVIS-BACON ACT.

While normally, of course, error in the decision below is not alone sufficient reason for exercise of this Court's certiorari jurisdiction, there are situations in which granting the writ is an appropriate and necessary method of correcting a serious error, especially when that error threatens substantial interference with a major congressional program or policy and undermines the clear policy statements of this Court. *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U. S. 134, 136 (1968); *Williams* v. *Lee*, 358 U. S. 217, 218 (1959).

This Court has already recognized the application of this principle to the instant case by granting certiorari and vacating

(Footnote continued from preceding page.)

to recover wages allegedly owing under the Davis-Bacon Act for work at Fermi National Accelerator Laboratory, another major research laboratory in the Chicago area, which also operates under contract with ERDA. Based upon *McDaniel I*, the district court has refused to dismiss the complaint in that case which is virtually identical to the Complaint herein. At least two other cases based upon an implied private right of action under the Davis-Bacon Act are currently pending in the Seventh Circuit. *United States for the Benefit of Eusebio Castellon* v. *Copenhaver*, Case No. 74 C 1230 (N. D. Ill.), and *Hernandez* v. *Frank Sorce Landscaping, Inc.*, Case No. 75 C 3828 (N. D. Ill.).

the judgment of the Seventh Circuit in *McDaniel I*.[29] For similar reasons, there is a compelling need for this Court's review of the Seventh Circuit's opinion on remand in *McDaniel II*. Because it again found the "governmental remedies" expressly provided by the Davis-Bacon Act "ineffective,"[30] the Seventh Circuit has once again seriously misconstrued the plain language of the Act and has misinterpreted its legislative history, with the consequence that a major congressional program will be subject to serious disruption if the decision below is allowed to stand. By substituting its implied judicial remedy for those remedies expressly created by Congress, the Seventh Circuit has overstepped its constitutional bounds. This Court should closely review this act of legislation by judicial fiat.

A. The Express Statutory Language Does Not Provide the Private Right of Action Created by the Seventh Circuit.

It is obvious and indisputable that the clear and unambiguous express language of Section 1 of the Davis-Bacon Act does not provide a private right of action in federal district court. Section 1 of the Act merely sets forth the requisite standards to which certain federal contracts must adhere. Section 1 contains no jurisdictional grant and creates no cause of action whatsoever. With the exception of the limited right of action afforded by Section 3(b), 40 U. S. C. § 276a-2(b), no other provision of the Davis-Bacon Act expressly creates a private right of action.

The Seventh Circuit's analysis, in *McDaniel I*, of the limited cause of action specifically provided in Section 3(b) of the Act was sound. *McDaniel I* carefully reviewed and analyzed the legislative history of the related statutes in question[31] and rightly concluded that Section 3(b) of the Act creates only a limited right of action on the bond:

29. 423 U. S. 810 (1975); App. A, p. A1.

30. 548 F. 2d at 694; App. B, p. A11.

31. Davis-Bacon Act, 40 U. S. C. § 276a *et seq.*; Miller Act, 40 U. S. C. § 270a *et seq.*; and Portal-to-Portal Act, 29 U. S. C. § 255 *et seq.*

> "We do not read the Portal to Portal provisions with respect to actions under the Davis-Bacon Act as congressional recognition of conferral by § 276a-2(b) of a right of action other than on the bond."[32]

The Court further concluded that Section 3(b) of the Act does not "create a cause of action, cognizable in federal court, for one in plaintiff's position."[33]

In *McDaniel II*, the Court has reaffirmed its original holding that the right of action in federal court created by Section 3(b) of the Act is limited to enforcement of the Miller Act bond:

> "At the outset, we reject appellant's (Respondent's) argument that 40 U.S.C. § 276a-2(b) explicitly gives laborers and mechanics a private right of action. We adhere to our prior opinion that the language in § 276a-2(b) applies only to the right of action on a Miller Act bond, set forth in § 270(b)." (Footnotes omitted.) 548 F. 2d at 693.

Petitioner has no quarrel with this holding. Petitioner does, however, once again respectfully contest the Seventh Circuit's misguided notion that an aggrieved individual has an implied private right of action springing from Section 1 of the Act. Petitioner submits that, by the well-established principle of *expressio unius est exclusio alterius*, the plain words of the statute preclude such an inference. Where Congress has expressly provided a particular way of redressing violations of a congressional enactment, other methods are not to be inferred.[34]

32. 512 F. 2d at 586; App. E, p. A20.

33. 512 F. 2d at 585; App. E, p. A18.

34. *See, e.g., Calhoon* v. *Harvey*, 379 U. S. 134 (1964); *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U. S. 246 (1951); *Blaney* v. *Florida National Bank at Orlando*, 357 F. 2d 27 (5th Cir. 1966); *Powell* v. *Washington Post Company*, 267 F. 2d 651 (D. C. Cir. 1959), *cert. denied*, 360 U. S. 930. The effect of specific designation of a remedy has long been recognized by this Court. *See, for example, Switchmen's Union of North America* v. *National Mediation Board*, 320 U. S. 297, 301 (1943): "All constitutional questions aside, it is for Congress to determine how the rights which it creates shall be enforced. . . . In such a case the specification of one remedy normally excludes another." *See also Fleischmann Distilling Corporation* v. *Maier Brewing Co.*,

(Footnote continued on next page)

The Seventh Circuit's opinion deprecates the weight to be accorded this principle in construing the words chosen by Congress to carry out its legislative intent. As this Court has recognized in *Amtrak*, and reaffirmed in both *SIPC* and *Cort*, this principle of statutory construction should not be ignored unless there is "clear contrary evidence of legislative intent."[35] In the present case, the legislative history compels the conclusion that Congress meant exactly what it said.

B. The Legislative History of the Davis-Bacon Act Clearly Indicates That Congress Did Not Intend to Provide the Private Right of Action Created by the Seventh Circuit.

Since the Davis-Bacon Act provides no express private right of action, we must turn to the legislative history to determine whether the inference of such a private right of action is "consistent with the evident legislative intent."[36] It is respectfully submitted that the inference of such a private right of action by the Seventh Circuit is wholly inconsistent with the legislative history of the Davis-Bacon Act and, more specifically, amendments to its enforcement provisions. Indeed, a proposed amendment, specifically *rejected* by the Congress, would have changed the Davis-Bacon Act to expressly provide the very right of action judicially created below by the Seventh Circuit. Under such circumstances, the Seventh Circuit has clearly transgressed congressional intent that no such right of action be permitted under the Act.

Petitioner has previously set forth relevant portions of legislative history of the Davis-Bacon Act several times during the

(Footnote continued from preceding page.)
386 U. S. 714, 720 (1967): "When a cause of action has been created by a statute which expressly provides the remedies for vindication of the cause, other remedies should not readily be implied."

35. *Amtrak*, 414 U. S. at 458; *SIPC*, 421 U. S. at 419.

36. *Amtrak*, *supra*, 414 U. S. at 458; *SIPC*, *supra*, 421 U. S. 412, 95 S. Ct. at 1737.

course of this litigation. But, each time that history has been presented to the Seventh Circuit, its import and significance herein has been ignored, particularly the proposed amendment that would have changed the Davis-Bacon Act to expressly provide the very right of action that has now been judicially created by the Seventh Circuit. It is again respectfully submitted that the inference of a private right of action here is wholly inconsistent with the legislative history of the Davis-Bacon Act. Under *SIPC* and *Amtrak*, *supra*, if the legislative history reveals "clear contrary evidence of legislative intent," contradicting the plain language of the statute, then the principle of *expressio unius est exclusio alterius* must yield to an implied right of action. In addition, dictum in *Cort*, while not fully explained by this Court, indicates that only an explicit congressional intent to *deny* a private cause of action would control. Even if this dictum is the rule, the legislative history of the Davis-Bacon Act clearly reveals that Congress intended to *deny* such an action. Since the Seventh Circuit gave only perfunctory attention to the legislative history of the Act, we once again present an analysis of relevant portions thereof for this Court's consideration.

The original Davis-Bacon Act, enacted by Congress in 1931, provided that the wages paid on certain federal construction projects "shall not be less than the prevailing rate of wages."[37] As intitially enacted, the statute contained only limited provisions relating to wage determinations, and provided no enforcement procedures. In 1932, Congress passed an amendment to the Act providing for the imposition of fines and deductions on any contractor violating the Act,[38] however, the proposed amendment was vetoed by President Hoover.[39] Subsequently, in 1935, Congress amended the Act to incorporate provisions for administrative predetermination of wages and for enforcement

37. Davis-Bacon Act of 1931, Chap. 411, § 1, 46 Stat. 1494.

38. S. 3847, 71st Cong. (1932).

39. See Veto Message (S. Doc. No. 134) (1932).

that remain unchanged today.[40] Specifically, the 1935 statute amended the original Act to provide a new Section 2, permitting the government to cancel contracts for non-compliance with the Act,[41] a new Section 3(a), authorizing the Comptroller General to withhold payments to contractors,[42] and a new Section 3(b), granting laborers and mechanics a limited right to sue in federal court to recover wages against the Miller Act bond.[43] Congress has not changed these basic provisions of the Davis-Bacon Act.

Although no substantive amendment to these provisions has been enacted, Congress has had the opportunity to review and debate proposed legislation which would have dramatically changed the Act. Specifically, in 1962 and 1963, the House Special Subcommittee on Labor held extensive hearings on various proposed amendments to the Davis-Bacon Act.[44] Among the legislative measures considered by the Subcommittee and the Congress were two bills[45] sponsored by Congressman Charles E. Goodell of New York, which would have amended the Davis-Bacon Act to provide extensive judicial review of administrative wage determinations and to provide a private right of action in federal court to enforce the Act.

H. R. 9590, proposed by Congressman Goodell, would have amended the Davis-Bacon Act to provide as follows:

> "Sec. 7. (a) *Whenever it is claimed that any contractor or subcontractor has refused or failed to pay the wages that he is required to pay by reason of a wage determination issued* by the Secretary of Labor [under the Davis-Bacon Act] to employees . . . the contracting agency shall investigate the claim . . . and . . . shall either deny or sustain such claim. . .
>
> • • • • •
>
> "(c) *Any employee aggrieved or adversely affected by any ruling made pursuant to subsection (a) of this section may bring an action in the United States district court* . . . against the contractor . . . to recover the amount of unpaid wages due under this Act. . . .
>
> "(d) In any action brought pursuant to subsection (b) or (c) of this section, the court shall have authority to determine the obligations of the contractor or subcontractor under the wage provisions of his contract, and whether or not the contractor or subcontractor has failed to comply with them. . . ." (Emphasis added.)[46]

Additionally, H. R. 9590 would have further amended the Act by adding a new Section 8 to provide for judicial review of wage determinations as follows:

> "Sec. 8. (a) Any person aggrieved by a wage determination for laborers or mechanics issued pursuant to this Act . . . may obtain judicial review of such determination in an action against the Secretary of Labor and the contracting agency in a district court of the United States.
>
> • • • • •
>
> "(e) At the conclusion of any hearing on the merits, the court shall, in any case in which it finds that the prevailing wage originally promulgated was not determined in accordance with law, establish such prevailing wage as it deems to be in accordance with law."[47]

If the plain language of these proposed amendments is not sufficiently clear, certainly Congressman Goodell's explanation

40. 40 U. S. C. §§ 276a-276a-2(b).

41. 40 U. S. C. § 276a-1.

42. 40 U. S. C. § 276a-2(a).

43. 40 U. S. C. § 276a-2(b).

44. Hearings Before the Special Subcommittee on Labor of the House Committee on Education and Labor, 87th Cong., 2d Sess. (1962).

45. H. R. 11115, 87th Cong., 2d Sess. (1962), and an amended version H. R. 9590, 88th Cong., 2d Sess. (1964).

46. H. R. 9590, 88th Cong., 2d Sess., §§ 7(a), (c) and (d) (1964).

47. The full text of H. R. 9590 is printed as Appendix H. H. R. 9590, 88th Cong., 2d Sess., §§ 8(a) and (e) (1964). In *McDaniel II*, the Seventh Circuit rejected consideration of this proposed legislation, reasoning that its language applied only to the narrow issue of judicial review of prevailing fringe benefits. The quoted language clearly reveals that the Seventh Circuit erred on this point.

of its intended purpose during debate on the House floor, should leave no doubt as to its intended meaning:

> "The judicial review section which I am offering permits an aggrieved individual who feels that the determination of the Secretary of Labor is erroneous to bring an action in federal court. . . ."[48]

The fact that these proposed amendments were rejected by the Congress is compelling evidence that the Seventh Circuit has erred. However, even more instructive is the wealth of comment and debate over these amendments which should leave absolutely no doubt as to the intent of Congress with respect to judicial relief.

At the conclusion of the extensive hearings into the various amendments proposed, the House Committee on Education and Labor, through its Chairman Adam C. Powell of New York, issued a report favoring an amendment to add fringe benefits to Davis-Bacon Act determinations,[49] but rejecting the concept of judicial review as embodied in the Goodell bill. In recommending that the House reject amendments adding judicial review to the Act, the majority report observed that:

> "[J]udicial review of wage determinations under the Davis-Bacon Act is *simply not practicable* and, in fact, could *frustrate the entire program*." (Emphasis added.)[50]

The majority report went on to note that some form of review of wage determinations should be provided; however, it concluded that "administrative improvements rather than a legislative solution provide the best approach."[51] The majority report then observed that the Secretary of Labor had recently established a Wage Appeals Board having jurisdiction over "all significant questions under these labor standard statutes" and concluded:

48. 88 Cong. Rec. 1227 (1964) (remarks by Congressman Goodell).
49. H. R. 6041, 88th Cong., 1st Sess. (1963).
50. H. R. Rep. No. 308, 88th Cong., 1st Sess., p. 4 (1964).
51. *Ibid.*

> "The Committee is confident that this Board offers the necessary procedural protections for interested parties, *without impeding the operation of our construction programs*." (Emphasis added.)[52]

Finally, and most significantly, the majority report commented on the authority of the Wage Appeals Board in enforcement matters and concluded that enforcement should be left to administrative proceedings:

> "In enforcement cases, the Board is empowered to review potential debarment cases on the record after full opportunity to be heard has been extended to any contractor or subcontractor. The committee believes that *the effectiveness and adequacy of this administrative approach should be thoroughly tested before consideration is given to other measures*." (Emphasis added.)[53]

From these comments on the proposed amendments, it is abundantly clear that the majority of the Committee, whose views were ultimately ratified by the House, considered the creation of judicial review inimical to the various interests promoted under the Act. Furthermore, it is equally clear from the acrimonious comments contained in the minority views, in which Congressman Goodell joined, that no provision of the Davis-Bacon Act provided for the recourse to the courts envisioned by the amendments proposed:

> "At the present time, every finding of the Secretary of Labor, with or without an investigation and with or without a hearing, is final. Neither employees or employers have any recourse except to beg the Secretary for mercy, or perhaps prevail upon their Congressman to intervene. It is an intolerable situation for such arbitrary and final authority to be lodged in a single administrator."[54]

This minority view added the cryptic warning that, "If fringe benefits [H. R. 6041] are approved by the Congress as separate

52. *Ibid.*
53. H. R. Rep. No. 308, 88th Cong., 1st Sess., p. 5 (1964).
54. H. R. Rep. No. 308, 88th Cong., 1st Sess., p. 29 (1964).

legislation, the opportunity for real reform will then be lost."[55] The minority view did not prevail.

When these amendments were reported out of committee and proceeded to the House floor for debate, Congressman Goodell and his colleagues once again attempted to secure the broad recourse to the courts by amendment to the Davis-Bacon Act. The debate on the House floor preceding the defeat of Congressman Goodell's proposed amendments[56] reveals that Congress intended to provide no such recourse to the courts. In this regard, Congressman Fogarty argued as follows:

> "What will the Goodell amendment do? This is what it will do. It will allow any contractor or subcontractor, bidder or prospective bidder, employee or prospective employee and so far as the bill is concerned, almost anyone who regards himself adversely affected by the Secretary's wage determinations to go into court and stop that project cold. . . .
>
> "This phrase 'judicial review' is an appealing concept, but it is not practical. Its purpose is to try to drive a wedge into the effective operation of the Davis-Bacon Act which has been in existence for the past 30-some years."[57]

The Goodell bill was defeated. In the words of the minority report, the "opportunity for real reform" was lost. But, nonetheless, Congress had spoken and spoken unequivocally with respect to the proposed recourse to the courts, both for judicial review of wage determinations and for enforcement of the Act. Congress viewed the administrative procedures then available as entirely adequate. Congress has spoken no differently in this regard since 1964. The intent of Congress could hardly be more clear.

Tracing the course of this legislative history of the Act clearly reveals that the implication of a private right of action is wholly inconsistent with the intent of Congress. The mere fact that

55. H. R. Rep. No. 308, 88th Cong., 1st Sess., p. 30 (1964).

56. 88 Cong. Rec. 1201-1231 (1964).

57. 88 Cong. Rec. 1201.

Congressman Goodell proposed legislation to create such a private right of action is a clear indication that none then existed. Indeed, the minority report argued strenuously (to no avail) for the passage of such a bill because in their view no such right of action then existed. And finally, after extensive committee hearings and reasoned debate, Congress specifically rejected the precise private right of action which the Seventh Circuit has fabricated.[58] Application of fundamental principles of the separation of powers yields the unavoidable conclusion that provisions of the Act which Congress has expressly refused to change by legislative processes should not be amended by the courts.

C. The General Structure and Purpose of the Davis-Bacon Act Will Be Frustrated by the Implied Private Right of Action Created by the Seventh Circuit.

The Seventh Circuit's decision, which affords a direct private right of action in federal district court for alleged violations of the Davis-Bacon Act, sweeps aside the comprehensive administrative control of the Act intended by Congress. In implying a direct cause of action under Section 1 of the Act, 40 U. S. C. § 276a, the Seventh Circuit failed to consider the far-reaching implications of its decision on the administration of federally funded construction contracts. The practical consequences of this decision will frustrate the general structure and purpose of the Davis-Bacon Act.[59]

58. It is noteworthy that the Seventh Circuit has created this right of action, not out of statutory ambiguity, and not out of legislative silence, but rather, the Court has acted in the face of and contrary to a clear and compelling congressional voice.

59. In failing to consider the practical effect of creating this private right of action, the Seventh Circuit disregarded the case of *Hewitt Robins, Incorporated* v. *Eastern Freight-Ways, Inc.*, 371 U. S. 84 (1962), where this Court concluded that "the allowance of a judicial remedy would result in undercutting the stability of the wage structure which the statutory procedures sought to insure." 371 U. S. at 87.

The basic flaw in the rationale of the Seventh Circuit's opinion is its overriding concern with the Act's "principal beneficiaries" as reflected in its statement that the Act "reveals the fundamental purpose . . . was to benefit laborers and mechanics."[60] In order to effectuate that purpose, the Seventh Circuit concluded that implication of a private right of action was necessary, despite the fact that none was provided by Congress. The court below ignored the fact that Congress devised a comprehensive administrative scheme for implementation of the Act and its many purposes and was especially sensitive to the potential for disputes pertaining to agency determinations on coverage and wage rates.

It has long been recognized that the Act has several related purposes, only one of which is the "prevailing wage" standard. The legislative history of the Act makes it clear that one of the important purposes of the entire statutory scheme is the maintenance of administrative controls over federally funded construction projects and the elimination of wage rates as a factor in bidding on government contracts.

The majority report of the House Committee on Education and Labor, in commenting on proposed amendments to the Davis-Bacon Act, clearly perceived the serious practical consequences entailed in permitting wholesale recourse to the courts to redress grievances arising under the Act. The majority report reasoned that judicial review was "simply not practicable" and stated that it "could frustrate the entire program."[61] The report went on to recommend "administrative improvements" rather than legislation of a judicial remedy because of the dire consequences visualized in the latter approach:

> "It could reasonably be anticipated that a flood of litigation would ensue which would be comparable in magnitude to the wave of wage-hour cases which inundated the courts some years ago and resulted in enactment of the Portal-to-

60. 548 F. 2d at 693; App. B, p. A8.
61. H. R. Rep. No. 308, 88th Cong., 1st Sess., p. 4 (1964).

> Portal Act. The construction of vital defense installations and other important construction activity would be seriously delayed while court proceedings are exhausted. Also, the contested wage determination would probably be out of date by the time the court's ruling is handed down. A new determination would be required, and the whole process might well be repeated."[62]

The Committee Report clearly envisioned the possibility that changed circumstances could warrant legislative change from a purely administrative review system to one involving judicial recourse. However, the Committee urged that "the effectiveness and adequacy of this administrative approach should be thoroughly tested before consideration is given to other measures."[63]

Clearly, the Committee visualized that such "other measures," if necessary, would be conceived and deliberated by the Congress, not the courts. Petitioner submits that, if the Davis-Bacon Act is to be amended as comprehensively as the Seventh Circuit has opined, the proper forum for such changes is in the Congress, where all competing policy considerations can be more fully ventilated through extensive committee hearings and reasoned debate. The courts are not the proper place for such detailed examination of public policy.

CONCLUSION.

The interpretation of the Davis-Bacon Act which the Seventh Circuit has adopted does not square with the plain language of the statute, its legislative history, or a proper conception of the purpose and general structure of the Act. It is submitted that the Seventh Circuit's decision totally emasculates a key part of this entire statutory scheme and, accordingly, threatens to disturb the delicate balance of competing policy considerations carefully

62. *Ibid.*
63. H. R. Rep. No. 308, 88th Cong., 1st Sess., p. 5 (1964).

weighed by Congress. The issue presented is a pure question of statutory interpretation bearing upon the threshold question of federal district court jurisdiction under the Act. It is an issue which does not require further consideration and refinement by lower courts prior to disposition by this Court. It is and will be a threshold jurisdictional question in pending and anticipated federal cases which, if allowed to proceed on their merits, will be complex, time-consuming and expensive. The decision of the Seventh Circuit is an appropriate vehicle for exercise of this Court's jurisdiction because that decision not only presents a fundamental question of statutory construction, but also has created a serious impediment to the continued implementation of the central policy of the Act, the elimination of wage rates as a factor in bidding on government contracts.

For all of the foregoing reasons. Petitioner prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this case on January 21, 1977.

Respectfully submitted,

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Appendices

APPENDIX A.

IN THE SUPREME COURT OF THE UNITED STATES,
423 U. S. 810
THE UNIVERSITY OF CHICAGO and ARGONNE,
Petitioners,
vs.
LOUIS ALLEN McDANIEL, JR.
No. 75-83.

Facts and opinion, 512 F. 2d 583.

Oct. 6, 1975. On petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit. Petition for writ of certiorari granted, judgment vacated and case remanded to the Court of Appeals for further consideration in light of *Securities Investor Protection Corp.* v. *Barbour*, 421 U. S. 412, 95 S. Ct. 1733, 44 L. Ed. 2d 263 (1975), and *Cort* v. *Ash*, 422 U. S. 66, 95 S. Ct. 2080, 45 L. Ed. 2d 26 (1975).

APPENDIX B.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 73-1438

LOUIS ALLEN MCDANIEL, JR.,
Plaintiff-Appellant,

vs.

THE UNIVERSITY OF CHICAGO and ARGONNE, a corporation,
Defendants-Appellees.

On Remand from the Supreme Court of the United States

Submitted January 30, 1976—Decided January 21, 1977

Before FAIRCHILD, *Chief Judge*, and SWYGERT and SPRECHER, *Circuit Judges.*

FAIRCHILD, *Chief Judge*. The question before us is whether, in light of *Securities Investor Protection Corp.* v. *Barbour*, 421 U. S. 412 (1975), and *Cort* v. *Ash*, 422 U. S. 66 (1975), Section 1 of the Davis-Bacon Act, 40 U. S. C. § 276a, contains an implied private right of action for the benefit of laborers and mechanics who are not paid the prevailing wage in their locality. The facts and history of the case are reported at 512 F. 2d 583 (7th Cir. 1975), where we held that the Davis-Bacon Act did contain an implied private cause of action, and that jurisdiction rested on 28 U. S. C. § 1337. The Supreme Court of the United States granted *certiorari*, vacated the judgment and remanded for consideration in light of the two above-mentioned cases,

which were decided subsequent to our decision in *McDaniel*, 423 U. S. 810.

In *Cort* v. *Ash*, *supra*, 422 U. S. at 78, the Supreme Court specified the relevant factors to be considered by any court in determining whether a private remedy is implicit in a federal statute.

"First, is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted' . . ., (citation omitted, emphasis supplied by Supreme Court) . . . that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? (Citation omitted.) Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? (Citation omitted.) And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the states, so that it would be inappropriate to infer a cause of action based solely on federal law?"

At issue in *Cort* was a criminal statute, 18 U. S. C. § 610, prohibiting corporations from making "a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors . . . are to be voted for." Considering the factors set out above, the Supreme Court held first that complainant citizens or stockholders were barred from enjoining alleged violations of § 610 in future elections because a statute passed after the filing of the suit, but prior to the Supreme Court's review, established an administrative procedure for processing complaints of § 610 violations; and that as far as an implied private right of action for damages was concerned, the primary congressional goals in passing § 610 had been eliminating corporate influence over elections and preventing corporate officials from contributing corporate funds without the consent of the stockholders. The statute had not been passed for the "especial" benefit of the shareholders.

Second, the Court noted that nothing in the legislative history of § 610 suggested a congressional intention to confer on shareholders a federal right to damages for violation of § 610. In examining the legislative history, the Court stated that in a case where the statute clearly granted a class of persons certain rights, it is not necessary to show an explicit congressional intention to create a private cause of action, although an explicit purpose to deny a private cause of action would be controlling. But in a case like *Cort*, where it was at best doubtful that Congress intended to vest rights in the plaintiff class, the Supreme Court concluded that absence of a suggestion in § 610's legislative history of a suit for damages strongly suggested a congressional intention to the contrary.

Third, the remedy of damages would not have served the purposes of the primary congressional goals. Repayment by corporate officials of funds contributed to political campaigns would not remedy the evil legislated against (corporate political influence), and would have had a minimal, if any, deterrent effect. Thus, concluded the Supreme Court, no private right of action was implicit in the criminal statute.[1]

Fourth, the Court deemed it appropriate to relegate stockholders similarly situated to whatever remedy is created by state law. The fact that there might be no remedy under the law of some states would not hinder the primary goal.

Similar reasoning is apparent in *Securities Investor Protection* v. *Barbour*, 421 U. S. 412 (1975), and in *Passenger Corp.* v. *Passenger Assn.*, 414 U. S. 453, 457-58 (1974), (hereafter "Amtrak"), on which *Securities Investor* heavily relies. In *Securities Investor*, the question was whether customers of failing broker-dealers had an implied private right of action under the Securities Investor Protection Act of 1970 (SIPA), 15 U. S. C. § 78aaa *et seq.*, to compel the Securities Investor Protection Corporation (SIPC) to exercise its statutory authority

1. This is not to say that a private right of action may never be implied in a criminal statute. See *Cort, supra*, 422 U. S. at 79.

for their benefit. The SIPC was a non-profit corporation designed by Congress to afford limited financial relief for losses suffered by customers of failing broker-dealers.

In holding that no private right of action was implicit in 15 U. S. C. § 78aaa *et seq.*, the Court stressed several factors. First, the very structure of the SIPC and SEC yielded a strong inference against private causes of action. The SIPC is a non-profit, corporate entity, designed to deal with a public problem, and is substantially supervised by the SEC. The SIPC's practice was to defer intervention, if at all possible, to enable endangered firms to avoid collapse by infusion of new capital or merger. *Securities Investor, supra*, 421 U. S. at 421, fn. 4. In this respect, suit for liquidation at the whim of the individual investor might be antithetical to the whole thrust of the statute. *Securities Investor, supra*, 421 U. S. at 422-23; *Cort* v. *Ash, supra*, 422 at 78, 84.

Second, a private cause of action would have been inconsistent with the very terms of the statute at issue. The respondent in *Securities Investor* argued that since 15 U. S. C. § 78ccc (b)(1) provided that since the SIPC can "sue and be sued, complain and defend, in its corporate name and through its own counsel, in any court, State, or Federal," Congress must have intended that an aggrieved customer of a member firm would be able to sue. However, 15 U. S. C. § 78ggg(b) limits SEC actions "to the district court of the United States in which the principal office of SIPC is located." As the Supreme Court pointed out, "It would be anomalous for Congress to have centralized SEC suits for the apparent convenience of the SIPC while exposing the corporation to substantively identical suits by investors 'in any court, State or Federal.'" 421 U. S. at 420, fn. 3.

Finally, conceding that Congress' primary purpose in enacting the SIPA and creating the SIPC was the protection of individual investors, *Securities Investor*, 421 U. S. at 421, the Court held that the other two factors, set out in *Cort* as well, of congressional intent and the consonance of the remedy with the purposes of the statute, were predominant.

Before turning to the facts of the case before us, we must also consider *Amtrak*, *supra*, 414 U. S. 453. Although not explicitly cited in the remand from the Supreme Court, *Amtrak* was heavily relied on by the Court in *Securities Investor*, and for that reason commands our attention. The question in *Amtrak* was whether a private right of action was implied in the Amtrak Act, 45 U. S. C. § 501 *et seq*. The respondent National Association of Railroad Passengers (NARP) sought to enjoin the announced discontinuance of certain passenger trains that had previously been operated by the petitioner Central of Georgia Railway. The Court of Appeals for the District of Columbia held that the Amtrak Act contained an implied private right of action. *Potomac Passengers Ass'n* v. *Chesapeake & Ohio Ry. Co.*, 475 F. 2d 325, 340 (D. C. Cir. 1973), *reversed sub nom. Passenger Corp.* v. *Passenger Assn.*, 414 U. S. 453 (1974). In reversing, the Supreme Court apparently assumed for the sake of argument that railroad passengers were the intended beneficiaries of the Amtrak Act; *Amtrak, supra*, 414 U. S. at 457-58. *Cf. Cort* v. *Ash, supra*, 422 U. S. at 80-82. However, with regard to the other two important concerns, *i.e.*, whether such a remedy would serve the underlying pupose of the statute, the Court found against NARP. Specifically, there was extensive evidence in the legislative history that the Congress contemplated no private right of action, and implication of a private right of action would have been at odds with the underlying purposes of the statute. As the Court noted, a holding that the Amtrak Act contained a private right of action would have been merely to substitute the federal district courts for the various administrative bodies formerly used to pass on proposed discontinuances, and ". . . would completely undercut the efficient apparatus that Congress sought to provide for Amtrak to use in the 'paring of uneconomic routes.'" *Amtrak, supra*, 414 U. S. at 463.

Thus, in the light of *Cort* and *Securities Investor*, our inquiry in the case before us is in four parts. First, we must determine whether a laborer like the members of the plaintiff class is the

"especial" beneficiary of the Davis-Bacon Act. *Cort, supra*, 422 U. S. at 78. If he is not, that may well dispose of the case at the outset. If he is, we have only passed the first hurdle. *Cf. Securities Investor, supra*, 421 U. S. at 421.

Second, we must determine whether the legislative history or the language of the Act itself reveals a congressional intent to deny a private right of action. Clear evidence of an intent to deny a private remedy would be controlling, although absence of evidence of a legislative intent to create a private cause of action would not necessarily be fatal to the plaintiff's case if we find that they were granted rights by the Davis-Bacon Act. *Cort, supra*, 422 U. S. at 82.

Third, we must determine whether a private right of action in this case would be necessary or even capable of effectuating the purpose of the Act. *Cf. Cort, supra*, 422 U. S. at 84; *Securities Investor, supra*, 421 U. S. at 420-23; *Amtrak, supra*, 414 U. S. at 461-64.

Finally, we must consider whether the cause of action is one traditionally relegated to state law.

We must consider, then, whether the plaintiff class of laborers and mechanics are the "especial" beneficiaries of the Davis-Bacon Act, 40 U. S. C. § 276a *et seq*. We conclude that they are. Defendant-appellee University of Chicago contends, citing S. Rep. No. 963, 88th Cong., 2nd Sess. (1964), that the Davis-Bacon Act was passed in 1931 for a variety of reasons: (a) that local contractors be protected from unfair competition; (b) that local craftsmen not be denied work by contractors who recruited labor from distant cheap labor areas; and (c) that local communities not lose the working ability and purchasing power of their citizens.

But for the plaintiff class to be the special beneficiaries does not mean that they must be the exclusive beneficiaries, that local contractors and communities may benefit from the Act does not mean that it was not principally directed toward the laborers and mechanics. The Davis-Bacon Act by its terms mandates

that the contract between the federal government and the contractor provide that laborers and mechanics hired by the contractor be paid the minimum wages determined by the Secretary of Labor to be prevailing for the corresponding class of laborers in the locality. The laborer is not only the principal beneficiary of the statute, but also a third-party beneficiary of a contract provided for by the statute.[2] Moreover, the legislative history of the Davis-Bacon Act and subsequent congressional comment on the Act reveals that the fundamental purpose of the Act was to benefit laborers and mechanics by paying them wages prevailing in private industry:

> "The purpose of this measure is to require contractors and subcontractors engaged in constructing, altering or repairing any public building of the United States or of the District of Columbia situated within the geographic limits of the United States to pay their employees the prevailing wage rates when such wage rates have been established by private industry." Statement of the Committee on Labor recommending passage of the Davis-Bacon Act to the House of Representatives, 71st Cong., 3rd Sess., H. R. Rep. No. 2453 (January 31, 1931).
>
> "Almost from the inception of Federal construction activity Congress recognized the necessity for providing basic wage protection to local laborers and mechanics employed on the construction. *It was precisely for the purpose of providing this protection that Congress passed the Davis-Bacon Act more than 30 years ago.* Virtually all segments of our society banded together to demand its adoption." (Emphasis added.) S. R. No. 963, 88th Cong., 2nd Sess. (March 17, 1964), 2 U. S. Code Congressional and Administrative News 2340.

Moreover, the Supreme Court of the United States recognized in *United States* v. *Binghamton Const. Co., Inc.*, 347 U. S. 171 (1954) that laborers are the primary beneficiaries of the Davis-Bacon Act:

2. As we note below, this status as a third-party beneficiary might well support an action for breach of contract in state court, or in federal court if diversity jurisdiction were satisfied. See *McDaniel*, 512 F. 2d at 586.

> "The language of the [Davis-Bacon] Act and its legislative history plainly show that it was not enacted to benefit contractors, but rather to protect their employees from substandard earnings by fixing a floor under wages on Government projects." 347 U. S. at 176-77.

The Court further stated:

> "On its face, the [Davis-Bacon] Act is a minimum wage law designed for the benefit of construction workers." 347 U. S. at 178.

We thus conclude that the Davis-Bacon Act was passed for the special benefit of the plaintiff class in this case.

We turn next to the question whether the language of the Act itself or its legislative history reveals a congressional intent to grant or deny a private right of action.

At the outset, we reject appellant's argument that 40 U. S. C. § 276a-2(b) explicitly gives laborers and mechanics a private right of action. We adhere to our prior opinion that the language in § 276a-2(b) applies only to the right of action on a Miller Act bond, set forth in § 270(b). See *McDaniel* v. *The University of Chicago*, 512 F. 2d 583, 585-86 (7th Cir. 1975), *vacated and remanded on other grounds*, 423 U. S. 810 (1975).[3]

We equally reject appellee University of Chicago's reliance on the legislative history of a bill sponsored by Congressman Goodell of New York which was ultimately defeated. The Goodell Bill, H. R. 9590, 88th Cong., 2nd Sess. (1964) dealt with the narrow issue of judicial review of the Secretary of Labor's determination of prevailing fringe benefits, and was offered as an Amendment to H. R. 6041 which provided that fringe benefits be included in the Secretary of Labor's determination under the Davis-Bacon Act.[4] The Congress did defeat

3. In *United States* v. *Binghamton Const. Co.*, 347 U. S. 171, 176 (fn. 12), the Court refers to the right of action conferred by 40 U. S. C. § 276a-2(b), without mentioning the Miller Act. We do not, however, read this as an indication by the Court that a right of action independent of the Miller Act is explicitly provided by § 276a-2(b).

4. The bill that Goodell sought to amend, H. R. 6041, was ultimately passed by the Congress.

Congressman Goodell's Amendment, but the issue of judicial review of the Secretary of Labor's determination of prevailing fringe benefits is not even remotely at issue in this case.

There is, however, evidence in other statutes, read *in pari materia* with the Davis-Bacon Act, that reveals a congressional recognition that laborers have rights of action under the contractual provisions required by 40 U. S. C. § 276a. The Portal to Portal Pay Act, 29 U. S. C. §§ 251-62, provides that a *two* year statute of limitations applies to any cause of action for unpaid minimum wages under the Davis-Bacon Act, see 29 U. S. C. § 255; and specifically contemplates a class action under the Davis-Bacon Act, see 29 U. S. C. § 256. The Miller Act, however, provides a *one* year statute of limitations on suits on the Miller Act bond, see 40 U. S. C. § 270b(b). Unless the Portal to Portal two year statute of limitations on Davis-Bacon actions is a nullity, Congress must have recognized that laborers are able to sue at least as third-party beneficiaries of the contract required by 40 U. S. C. § 276a in state court or in federal court if there were proper jurisdiction. See *McDaniel, supra,* 512 F. 2d at 586.

Next, we consider whether an implied private right of action would be necessary or even capable of effectuating the purposes of the Davis-Bacon Act. Unlike the statutes at issue in *Cort* and *Securities Investor*, the Davis-Bacon Act contemplates by its terms some private enforcement. Specifically, 40 U. S. C. § 276a-2 provides that laborers and mechanics shall have a right of action against the contractor and his sureties if they have not been paid the required wages, and if the funds (if any) withheld by the government are insufficient to make them whole.[5] This case is unlike *Cort*, where the plaintiffs sought to benefit from a statute passed for a different end. It is unlike *Securities Investor*, where the relief sought would have undermined the statutory purpose of shoring up financially endan-

5. As noted above in this opinion, we have construed this expressly conferred right of action to be a suit on the bond. Appellee University of Chicago makes the point that such a suit must be

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gered brokerage houses, or *Amtrak*, where a private right of action would have introduced a new evil (the possibility of conflicting results among various federal district courts). The Davis-Bacon Act already contemplates under some circumstances a private action, on a Miller Act bond, to provide laborers with a remedy. But a bond only insures the solvency of the defendant, *i.e.*, that the remedy will be worth something. The policy behind the remedy itself, private suit, is not really in question.

Moreover, this case is a good example of how the governmental remedies specifically provided in the Act can be ineffective in accomplishing the congressional purpose. The Executive did not withhold funds from the contractor, see 40 U. S. C. § 276a; did not require a bond from the contractors, see 40 U. S. C. § 270a and 270(a); and did not invoke the sanctions of termination, see 40 U. S. C. § 276a-1, or blacklisting, see 40 U. S. C. § 276a-2(a).

Finally, although an action for breach of an employment contract is traditionally a state court action, the right to recover the unpaid portion of the prevailing wage is based on the congressional choice of a federal policy. Unlike the situation presented in *Cort*, the failure of a state to grant a recovery to a laborer, suing as a third-party beneficiary, would tend to defeat the federal policy if a federal remedy did not exist.

The appellee University of Chicago argues disingenuously that it would be somehow inequitable to allow a private right of action in this case, because ". . . if a government contract is let which does not demand prevailing wages and bonds, and the contractor bids or negotiates on that possibly lesser-cost basis, a later date complaint by an employee addressed to the con-

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brought in the name of the United States for the use of the person suing, see 40 U. S. C. § 270(f), and hence it is not really a private remedy. We reject this argument. Although the United States is the nominal plaintiff, the laborer or mechanic retains real control of the lawsuit, including whether to bring it in the first place. In substance, it is a private cause of action.

tractor alone is obviously aimed in error." Appellee's brief at 10. This hypothetical rendition of the case is extremely misleading. While it is true that no bond was exacted in this case, the plaintiffs-appellants allege that the government contract with appellee *did* contain the prevailing wage requirement, and appellee does not deny it.[6] The district court, although deciding in favor of appellee, conceded that the plaintiffs might have a cause of action in state court, presumably as third-party beneficiaries of the contract. Assuming the facts alleged, the contractor in this case has been unjustly enriched by contracting on the basis of prevailing wage costs, while in fact paying less than the prevailing wage.

In sum, we hold that implying a private right of action in the Davis-Bacon Act is necessary to effectuate the intention of Congress in passing the statute. Unless we read *Cort* and *Securities Investor* to require an explicit statement of congressional intent before an implied remedy may be found in any case, *cf. Cort, supra,* 422 U. S. at 82, we find an implied right of action here.

Cort and *Securities Investor*, the two cases cited in the judgment of the Supreme Court ordering remand, dealt almost exclusively with the implication of remedies, and provide no guidance on the question whether there is federal court jurisdiction of a cause of action if implied. In *McDaniel*, 512 F. 2d at 587-88, we held that federal court jurisdiction over this case is found in 28 U. S. C. § 1337. We do not understand that the Supreme Court directed a reconsideration of the jurisdictional issue, and the parties (except for an *amicus*) have not argued it in their briefs on remand. We adhere to our decision on the point.

The judgment dismissing the complaint is reversed and the cause is remanded for further proceedings consistent with this opinion and with the opinion filed March 15, 1975.

6. Nor is there any question in this case concerning the Secretary of Labor's determination of the prevailing wages in the relevant time and area. See Federal Register, Vol. 36, No. 157, August 13, 1971, pp. 15150 *et seq.*

APPENDIX C.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

February 14, 1977.

HON. THOMAS E. FAIRCHILD, *Chief Judge*

LOUIS ALLEN MCDANIEL, JR., *Plaintiff-Appellant,*

No. 73-1438 *vs.*

UNIVERSITY OF CHICAGO and ARGONNE, a corp., *Defendants-Appellees.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 72 C 270

This matter comes before the Court on the "Motion for Stay of Mandate," filed herein on February 10, 1977 by counsel for the defendants-appellees. On consideration whereof,

IT IS ORDERED that the mandate of this Court be STAYED until March 16, 1977, in accordance with the provisions of Rule 41(b) of the Federal Rules of Appellate Procedure.

APPENDIX D.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

March 16, 1977.

HON. THOMAS E. FAIRCHILD, *Chief Judge*

LOUIS ALLEN MCDANIEL, JR., *Plaintiff-Appellant,*

No. 73-1438 *vs.*

UNIVERSITY OF CHICAGO and ARGONNE, a corp., *Defendants-Appellees.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 72 C 270

This matter comes before the Court on the "Motion for Further Stay of Mandate" filed herein on March 15, 1977 by counsel for the defendants-appellees. On consideration whereof, this Court being fully advised in the circumstances,

IT IS ORDERED that the mandate of this Court be STAYED until April 22, 1977, pursuant to the provisions of Rule 41(b) of the Federal Rules of Appellate Procedure.

APPENDIX E.

IN THE UNITED STATES COURT OF APPEALS,
For the Seventh Circuit,
512 F. 2d 583 (1975).

No. 73-1438

LOUIS ALLEN MCDANIEL, JR., *Plaintiff-Appellant,*

vs.

THE UNIVERSITY OF CHICAGO AND ARGONNE, a corporation, *Defendants-Appellees.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division—No. 72 C 270
PHILIP W. TONE, *Judge.*

Argued April 11, 1974—Decided March 14, 1975

Before FAIRCHILD, *Chief Judge*, and SWYGERT and SPRECHER, *Circuit Judges.*

FAIRCHILD, *Chief Judge.* Plaintiff McDaniel has appealed from a judgment dismissing his complaint in a class action against the University of Chicago.

The University had a contract with the United States for construction or alteration of Argonne National Laboratory. There is no question but that this government contract was subject to the provisions of the Davis-Bacon Act. Accordingly 40 U. S. C. § 276a required the specifications to "contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract

work" in the place of performance, and required any contract based on the specifications to contain certain stipulations concerning payment of mechanics and laborers by the contractor or subcontractor.

Plaintiffs claimed that they were employed pursuant to the contract, but were paid at rates substantially lower than the determined prevailing wages. The complaint purported to state five causes of action. The first was apparently based on the theory that a cause of action against the contractor is conferred by 40 U. S. C. § 276a-2(b) or should be implied from § 276a, and the second on the theory that the contract had been breached. Jurisdiction was predicated on 28 U. S. C. § 1331 (federal question) and § 1337 (action arising under Act regulating commerce). Three other causes of action suggest common law theories and pendant jurisdiction was claimed.

The same facts which subject the University's contract with the United States to the Davis-Bacon Act, 40 U. S. C. §§ 276a to 276a-7, also make it subject to the Miller Act, 40 U. S. C. §§ 270a-270e. Section 270a requires that before such a contract is awarded, the contractor shall furnish, in addition to a performance bond, "A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person."

Section 270b provides that "Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a . . . and who has not been paid in full therefore [within a specified period] shall have the right to sue on such payment bond . . ." subject to specified conditions, including a limitation of jurisdiction of such action to the federal district court for the place of performance of the contract and prohibition of commencement after one year.

Turning to the Davis-Bacon Act, § 276a requires that the contract authorize withholding by the government of accrued

payments to the extent considered necessary to pay laborers and mechanics the difference between the rates of wages required and the rates of wages received. Section 276a-2(a) authorizes direct payment of sums due to laborers and mechanics from sums withheld. It is undisputed, however, that no money was withheld in this instance.

Section 276a-2(b) provides:

> "If the accrued payments withheld under the terms of the contract, as aforesaid, are insufficient to reimburse all the laborers and mechanics, with respect to whom there has been a failure to pay the wages required pursuant to sections 176a to 276a-5 of this title, such laborers and mechanics *shall have the right of action and/or of intervention against the contractor and his sureties conferred by law upon persons furnishing labor or materials*, and in such proceedings it shall be no defense that such laborers and mechanics accepted or agreed to accept less than the required rate of wages or voluntarily made refunds." (Italics ours.)

Clearly plaintiff and members of the class could have brought action under § 270b(a) within one year if a bond had been furnished. It is undisputed, however, that the University did not furnish a bond. Section 270e authorizes waiver of §§ 270a-270d as to certain types of projects. No claim has been made that waiver was unauthorized in the instant case and, indeed, the complaint, as distinguished from the brief on appeal, does not suggest that the claims are founded upon the University's failure to provide a bond.[1]

1. The Heard Act, predecessor to the Miller Act, was consistently interpreted as providing a cause of action and federal subject matter jurisdiction only when there was a bond extant which expressly included the obligation to "make payments to all persons supplying . . . labor or materials in the prosecution of the work provided for" in the government contract. The underlying statutory requirement to execute such a bond was not deemed sufficient to provide a federal action. See, *e.g.*, *United States for the use of National Regulator Co.* v. *Montgomery Heating & Ventilating Co., et al.*, 255 F. 2d 683, 684 (5th Cir. 1919); *United States for the use of Felix Zambetti* v. *American Fence Co.*, 15 F. 2d 449 (S. D. N. Y. 1925), aff'd 15

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Thus plaintiff and members of the class (assuming as claimed that they were paid less than properly determined prevailing wages) have available to them neither direct payment by the government out of amounts withheld, nor an action on a Miller Act bond, the two remedies clearly contemplated by Congress.

The district court reluctantly concluded that the Davis-Bacon Act did not confer a right of action against the contractor, cognizable in federal court, under the circumstances alleged in the complaint. The language we have italicized above in § 276a-2(b) was deemed no more than a reference to the right of action on the Miller Act bond, set forth in § 270b.

We have no difficulty in agreeing that the terms of § 276a-2(b) do not create a cause of action, cognizable in federal court, for one in plaintiff's position.

For many years, begining in 1894, the Heard Act required that the bond filed by certain government contractors include the obligation to "make payments to all persons supplying him or them labor and materials in the prosecution of the work provided for in such contract" and that upon the bond "said person or persons supplying such labor and materials shall have a right of action . . ." 28 Stats. 278.

In 1931, Congress enacted the provision of the Davis-Bacon Act which required the contract to provide "that the rate of wages for all laborers and mechanics employed by the contractor or any subcontractor in the public buildings covered by the contract shall be not less than the prevailing rate of wages for work of similar nature" in the locality. 46 Stat. 1494. No remedy was expressly provided, although it might well be supposed that an underpaid person might have a cause of action as a third-

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F. 2d 450 (2nd Cir. 1926); *Strong* v. *American Fence Const. Co.*, 245 N. Y. 48, 156 N. E. 92, 93 (1927). The Miller Act has been similarly construed as not providing a federal cause of action for failure to provide a bond. *Cf. Harry F. Ortlip Co. of Pennsylvania* v. *Alvey Ferguson Co.*, 223 F. Supp. 893, 894 (E. D. Pa. 1963); *Gallagher & Speck, Inc.* v. *Ford Motor Co.*, 226 F. 2d 728, 731 (7th Cir. 1955).

party beneficiary of the contract, particularly since the provision was required by law for his protection.

In 1935, two changes took place. On August 24, the Miller Act replaced the Heard Act, 49 Stat. 793, and on August 30, the Davis-Bacon Act was amended by inserting, among other things, the remedy provisions substantially in their present form. 49 Stat. 1011. Although the Miller Act preceded the Davis-Bacon amendments in enactment by six days, the Heard Act was in effect while the amendments were being drafted.

The language of the statutes, and the sequence of enactment referred to, make it clear that "the right of action" referred to in § 276a-2(b) meant, when drafted, the "right of action" on the bond conferred on persons supplying labor and materials by the Heard Act, and supplanted by "the right to sue on such payment bond" conferred on such persons by the Miller Act, § 270b(a).

This meaning was specified in the Senate Report accompanying the 1935 bill, as follows:

> "Section 3(b) [§ 276a-2(b)]: When the funds withheld for such claimants are insufficient to reimburse all laborers and mechanics aggrieved by breach of the wage stipulations, this subsection gives such laborers and mechanics a cause of action on the contractor's bond, pursuant to the provisions of the Hurd [Heard] Act as amended from time to time (act of Aug. 13, 1894, 28 Stat. 278, U. S. C. title 40, sec. 230)." Sen. Rep. No. 1155, 74th Cong., 1st Sess., 4 (1935). See remarks of Senator Walsh to the same effect, 79 Cong. Rec. 12073 (July 30, 1935).

Numerous provisions with respect to Portal to Portal Pay, 29 U. S. C. §§ 251-262, refer to liability or actions to recover minimum wages under the Davis-Bacon Act, as well as similar actions under the Fair Labor Standards Act of 1938 and the Walsh-Healey Act. Plaintiff refers particularly to § 255(a) which imposes a two year statute of limitations on such actions. Pointing out that 40 U. S. C. § 270b(b) prohibits a suit on the bond under the Miller Act after one year after the last per-

formance of labor, plaintiff argues that the Davis-Bacon Act must contemplate a private right of action different from the right to sue on this bond. We do not read the Portal to Portal provisions with respect to actions under the Davis-Bacon Act as congressional recognition of conferral by § 276a-2(b) of a right of action other than on the bond. We do conclude, however, that it may well be recognition that wage-earners have or may have rights of action under the contractual provisions required by § 276a which may be enforced in state court actions or federal court actions where jurisdiction is properly based.[2]

Such a right of action is consistent with the congressional purpose in the Davis-Bacon Act: insuring the payment of "prevailing" wages to laborers and mechanics on all government contracts in excess of $2000. In a case in which the express remedies provided to fulfill this purpose, e.g., the withholding of accrued payments due the contractor by the government for direct payment to underpaid laborers and mechanics (40 U. S. C. § 276a(a)) and a suit on the required Miller Act payment bond (40 U. S. C. § 270b(a)), have proved ineffective, we should be especially "alert to provide such remedies as are necessary to make effective the congressional purpose." *J. I. Case* v. *Borak*, 377 U. S. 426, 433 (1964).[3]

2. The Miller Act's grant of subject matter jurisdiction, while underlying the right of action referred to in 40 U. S. C. § 276a-2(b) (Davis-Bacon), is "inseparably linked" to the statutory remedy of an action on the payment bond and thus cannot provide jurisdiction over a cause of action arising from the contractual commitment to pay "prevailing" wages imposed by § 276a(a). The Miller Act requirements that suit be brought in the name of the United States for the use of the person suing, that venue be limited to the district in which the contract was to be performed or executed, and the narrow one year limitation period are clearly designed to facilitate the orderly and equitable disposition of all competing rights in the bond and reenforce the conclusion that Miller Act subject matter jurisdiction is limited to suits on the bond. See *United States* v. *Illinois Surety Co.*, 253 Pa. 557, 98 A. 730 (1916); *Strong* v. *American Fence Co.*, 245 N. Y. 48, 156 N. E. 92 (1927); and note 1, *supra*, and cases cited therein.

3. Where the express remedies provided depend, as here, on governmental enforcement (of both the withholding provision and

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Plaintiff alleges that jurisdiction is predicated upon 28 U. S. C. § 1337 which provides in pertinent part:

> "The district courts shall have original jurisdiction of any civil actions . . . arising under any Act of Congress regulating commerce."

The scope of jurisdiction granted by this provision has been broadly construed. In *Murphy* v. *Colonial Federal Savings and Loan Ass'n*, 388 F. 2d 609, 614-15 (2nd Cir. 1967), the court, Judge Friendly writing, held that the provision encompassed any actions arising under "all acts whose constitutional basis is the commerce clause" and that "to found jurisdiction upon § 1337, it is not requisite that the commerce clause be the exclusive source of Federal power; it suffices that it be a significant one." See also, *Imm* v. *Union R. R.*, 389 F. 2d 858, 860 (3rd Cir. 1961), *cert. denied*, 368 U. S. 833; *Sosa* v. *Fite*, 465 F. 2d 1227 (5th Cir. 1972); *Moreno* v. *United States Dep't of Agriculture*, 345 F. Supp. 310, 312-13 (D. D. C. 1972), aff'd, 413 U. S. 528 93 S. Ct. 2821, 37 L. Ed. 2d 782 (1973); C. Wright, Law of Federal Courts (2nd ed. 1970), at p. 109 and cases cited in note 33.

We conclude that the commerce clause constitutes a significant constitutional basis underlying the Davis-Bacon Act's validity. The requirement that all specified government construction contracts contain an express commitment to pay local "prevailing" wage rates as determined (in case of dispute) by the Secretary of Labor was first enacted in 1931, c. 411, § 1, 46 Stat. 1494. The committee report, Sen. Rep. No. 1494, 71st Cong., 3rd Sess. (1931), makes clear that the Act was designed to "provide a more equable distribution of employment . . . and [to] generally benefit the country at large" by preventing government contractors from importing migratory labor at substantially less than prevailing wages. The country

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the bond requirement), "the guarantee [of "prevailing" wages] . . . might well prove an empty promise unless the private citizen were allowed to seek judicial enforcement . . ." *Allen* v. *State Board of Elections*, 393 U. S. 545, 557 (1968).

was then in the midst of a serious economic depression and government construction projects were considered an important element of recovery through the employment opportunities they provided. One basic premise of this legislation was to foster economic stability throughout the nation by requiring that those employed on federal projects receive fair and equitable wages. While Congress (possibly because of narrow views of federal jurisdiction then widely held) elected to limit its attention to federal construction projects, and other constitutional provisions doubtless exist which provide additional bases of legislative power, we think a sufficient nexus exists with the commerce clause to found jurisdiction upon § 1337.[4]

We therefore conclude that plaintiff's complaint, in that it sought to enforce defendant's contractual commitment to pay "prevailing" wages as determined by the Secretary of Labor, stated a cause of action under the Davis-Bacon Act for which relief could be granted and that subject matter jurisdiction was properly based upon 28 U. S. C. § 1337.[5] Once the district court had jurisdiction over this cause of action, it also had pendant jurisdiction to decide the state claims, arising out of the same facts, which were asserted in counts 3 through 5. *United Mine Workers* v. *Gibbs*, 383 U. S. 715 (1966).

Accordingly, the judgment dismissing the complaint is reversed and the cause is remanded for further proceedings consistent with this opinion.

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4. The Fair Labor Standards Act of 1938, 29 U. S. C. § 201 *et seq.*, reflecting a similar intent to forbid the payment of substandard wages, *cf.* 29 U. S. C. § 202(a), imposed a minimum wage requirement upon employers and was held to constitute a proper legislative utilization of the commerce power. *United States* v. *Darby*, 312 U. S. 100, 117-124 (1941).

5. It is also alleged that jurisdiction is predicated upon 28 U. S. C. § 1331. Not only must the matter in controversy arise under federal law, but must exceed $10,000. The complaint indicates only that the accumulated claims of members of the class exceed that amount. Such cumulation does not suffice either in diversity or federal question cases. *Snyder* v. *Harris*, 394 U. S. 332 (1969); *Zahn* v. *International Paper Co.*, 414 U. S. 291 (1973); *National Treasury Employees Union* v. *Nixon*, 492 F. 2d 587, 592 (D. C. Cir. 1974).

APPENDIX F.

UNITED STATES DISTRICT COURT,
Northern District of Illinois,
Eastern Division.

LOUIS ALLEN MCDANIEL, JR., *Plaintiff*,
vs.
THE UNIVERSITY OF CHICAGO, a corporation, and ARGONNE, a corporation, *Defendants*.
No. 72 C 270.

MEMORANDUM OF DECISION.

PHILIP W. TONE *District Judge*.

The Bacon-Davis Act requires that on all Government construction contracts in excess of $2,000, laborers and mechanics will be paid at least the wages which the Secretary of Labor determines are "prevailing" for the corresponding classes of laborers and mechanics employed on projects of a similar character in the locality in which the work is to be performed. The Act provides that the contracting officer may withhold from the contractor a sum sufficient to reimburse the laborers and mechanics for any difference between the prevailing wages and the wages they actually receive. If such sums are withheld, the Comptroller-General is empowered to make the reimbursements from the sums withheld. If the funds withheld are insufficient to reimburse the laborers and mechanics in full, they may recover the rest by resorting to "the right of action and/or of intervention against the contractor and his sureties conferred by law upon persons furnishing labor or materials, and in such proceedings it shall be no defense that such laborers and mechanics

accepted or agreed to accept less than the required rate of wages or voluntarily made refunds." 40 U. S. C. § 276a-2(b). The statutory scheme also provides a range of penalties which the Government may bring to bear upon a contractor who pays substandard wages, including terminating his contract and blacklisting him.

Plaintiff in this action alleges that he and the class he seeks to represent were employed as laborers or mechanics on a Government construction contract covered by the Act at the Argonne National Laboratory, and that defendants failed to pay them the prevailing wages to which the Secretary of Labor had determined they were entitled. The contracting officer failed to withhold any funds for reimbursement. Plaintiff seeks damages under the Act for himself and the class and, since the provisions of the contract reflected the wage rates required by the Act, he also seeks damages for breach of contract and related claims under state law under this Court's pendent jurisdiction.

The defendant university has moved to dismiss, relying primarily on its contention that the Bacon-Davis Act does not admit of a private right of action under the circumstances alleged in the complaint. Defendant argues that the Act establishes an enforcement scheme in which it is solely up to the Government to institute sanctions against an offending contractor—contract termination, blacklisting, or withholding accrued payments for reimbursement. Only in the limited situation where the Government itself has invoked the statute by actually withholding funds in an amount which proves to be inadequate does the defendant concede that an aggrieved employee may proceed on his own behalf under § 276a-2(b). Furthermore, defendant contends that the right of action referred to there is solely limited to an action on the contractor's bond under the Miller Act, 40 U. S. C. § 270b to be pursued in the name of the United States.

Defendant's contention that there is no right of action, whether limited to the Miller Act remedy or not, when the

contracting officer has failed to withhold accrued payments from the contractor has no warrant in either the language of the statute or its legislative history. Section 276a-2(b) merely says that when the funds withheld "are insufficient," the laborers and mechanics shall have their right of action. That language should be interpreted to produce a rational result. Congress can hardly have intended that the remedy be available if the contracting officer withholds something, but less than the amount needed to reimburse the laborers and mechanics in full, but not if he withholds nothing at all, when some amount is needed for reimbursement. There is no reason to believe that Congress meant to leave it to the contracting officer to decide whether laborers and mechanics could obtain redress for a violation of their rights. On the contrary, there is evidence in the legislative history that Congress intended that aggrieved laborers and mechanics have a right of action when no funds have been withheld. Senator Walsh of Massachusetts described the bill which ultimately became § 276a-2(b) with these words:

> "[It will] provide remedies for laborers and mechanics aggrieved by forced rebate or failure to pay the prevailing rate of wages by allowing such laborers and mechanics to have the same right of action against the contractors and his sureties in court which is now conferred by the bond statute on persons funrishing labor and materials *when there are no funds to withhold for reimbursement.*" At 79 Cong. Rec. 12073 (July 30, 1935). (Emphasis added.)

The more difficult question is whether Congress intended to limit the right of action specified in § 276a-2(b) to an action on the contractor's bond under the Miller Act. I conclude reluctantly that it did so intend. Mindful as I am of the Supreme Court's admonition that "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the Congressional purpose," *J. I. Case Co.* v. *Borak*, 377 U. S. 426 (1964), and mindful that, ironically, if there were no langauge at all about a private right of action in the Bacon-Davis Act we would be justified in finding an implied right of

action where a statutory scheme of remedies depends solely upon the actions of Government officials, *Allen* v. *State Board of Elections*, 393 U. S. 544, 556-57 (1968), there is no way to avoid the thrust of the statute's language and legislative history in delimiting the right of action to one which Congress felt would be adequate to protect employees whose contractors failed to pay them the wages prescribed by the statute. For the language specifies that aggrieved employees shall have "*the* right of action and/or of intervention against the contractor and his sureties conferred by law upon persons furnishing labor or materials. . . ." This language is not only descriptive of the Heard, now Miller, Act, but the choice of initial article lends weight to defendant's conclusion that Congress had only one right of action in mind. This conclusion is buttressed by the portion of Senator Walsh's remarks quoted above which refers to "the bond statute," and by the Senate Report accompanying the legislation, S. Rep. No. 1155, 74th Cong., 1st Sess., 4 (1935), which say:

> "Section 3(b): When the funds withheld for such claimants are insufficient to reimburse all laborers and mechanics aggrieved by breach of the wage stipulations this subsection gives such laborers and mechanics a cause of action on the contractor's bond, pursuant to the provisions of the Hurd [Heard] Act as amended from time to time (act of Aug. 13, 1894, 28 Stat. 278, U. S. C. title 40, sec. 230)."

Accord, *Willis* v. *E. I. DuPont de Nemours & Co.*, 76 F. Supp. 1010 (D. C. Okla. 1948).

Plaintiff has stated in his memorandum that no bonds were ever filed in this case pursuant to the Miller Act to protect him and his fellow employees against violations of the Bacon-Davis Act, and that they will be left without a remedy unless they are allowed an ordinary direct action against the contractor pursuant to the Bacon-Davis Act. The parties do not explain, nor can I discern, why, in light of the Miller Act's clear requirements, no bonds were filed. It is possible that plaintiff may have an

action against the contractor in the state court. But he has no remedy, nor may this Court's jurisdiction be invoked, under the Bacon-Davis Act. While it is true that in this case giving effect to what I perceive to be the Congressional intention may leave plaintiff without a federal remedy, it appears that these are extraordinary circumstances and that in the ordinary case the statutory scheme of remedies supplemented by the limited private right of action of § 276a-2(b), will suffice to effectuate the Congressional purpose of protecting employees from substandard earnings, *United States* v. *Binghamton Construction Co.*, 347 U. S. 171, 177 (1964).

Since no cause of action could properly be stated under the Miller Act in the absence of a bond, *Harry F. Ortlip Co. of Pennsylvania* v. *Alvey Ferguson Co.*, 223 F. Supp. 893, 895 (E. D. Pa. 1963), there is no possible way to make out a violation of the Bacon-Davis Act cognizable in a private action under that Act. No purpose would therefore be served by amending the complaint. And in light of our resolution of the issues discussed above, there is no need to consider the class action and statute of limitation issues raised in the motion and supplementary motion to dismiss.

Defendant's motion to dismiss the complaint is granted.

/s/ PHILIP W. TONE,
United States District Judge.

Dated: March 12, 1973.

APPENDIX G.

28 U. S. C. § 1337. Commerce and anti-trust regulations.

The district court shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

40 U. S. C. § 276a. Rate of wages for laborers and mechanics.

(a) The advertised specifications for every contract in excess of $2,000, to which the United States or the District of Columbia is a party for construction, alteration, and/or repair, including painting and decorating, of public buildings or public works of the United States or the District of Columbia within the geographical limits of the States of the Union, or the District of Columbia, and which requires or involves the employment of mechanics and/or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the city, town, village, or other civil subdivision of the State, in which the work is to be performed, or in the District of Columbia if the work is to be performed there; and every contract based upon these specifications shall contain a stipulation that the contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work, unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at time of payment, computed at wage rates not less than those stated in the advertised specifications, regardless of any contractual relationship which may be alleged to exist between the contractor or

subcontractor and such laborers and mechanics, and that the scale of wages to be paid shall be posted by the contractor in a prominent and easily accessible place at the site of the work; and the further stipulation that there may be withheld from the contractor so much of accrued payments as may be considered necessary by the contracting officer to pay to laborers and mechanics employed by the contractor or any subcontractor on the work the difference between the rates of wages required by the contract to be paid laborers and mechanics on the work and the rates of wages received by such laborers and mechanics and not refunded to the contractor, subcontractors, or their agents.

(b) As used in sections 276a to 276a—5 of this title the term "wages", "scale of wages", "wage rates", "minimum wages", and "prevailing wages" shall include—

(1) the basic hourly rate of pay; and

(2) the amount of—

(A) the rate of contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a fund, plan, or program; and

(B) the rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing benefits to laborers and mechanics pursuant to an enforcible commitment to carry out a financially responsible plan or program which was communicated in writing to the laborers and mechanics affected,

for medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, for unemployment benefits, life insurance, disability and sickness insurance, or accident insurance for vacation and holiday pay, for defraying costs of apprenticeship or other similar programs, or for other bona fide fringe benefits, but only where the contractor or subcontractor is not required by other Federal, State or local law to provide any of such benefits:

Provided, That the obligation of a contractor or subcontractor to make payment in accordance with the prevailing wage determinations of the Secretary of Labor, insofar as sections 276a to 276a—5 of this title and other Acts incorporating sections 276a to 276a—5 of this title by reference are concerned may be discharged by the making of payments in cash, by the making of contributions of a type referred to in paragraph (2)(A), or by the assumption of an enforcible commitment to bear the costs of a plan or program of a type referred to in paragraph (2)(B), or any combination thereof, where the aggregate of any such payments, contributions, and costs is not less than the rate of pay described in paragraph (1) plus the amount referred to in paragraph (2).

In determining the overtime pay to which the laborer or mechanic is entitled under any Federal law, his regular or basic hourly rate of pay (or other alternative rate upon which premium rate of overtime compensation is computed) shall be deemed to be the rate computed under paragraph (1), except that where the amount of payments, contributions, or costs incurred with respect to him exceeds the prevailing wage applicable to him under sections 276a to 276a—5 of this title, such regular or basic hourly rate of pay (or such other alternative rate) shall be arrived at by deducting from the amount of payments, contributions, or costs actually incurred with respect to him, the amount of contributions or costs of the types described in paragraph (2) actually incurred with respect to him, or the amount determined under paragraph (2) but not actually paid, whichever amount is the greater.

40 U. S. C. § 276a-2 Payment of Wages by Comptroller General from Withheld Payments; Listing contractors Violating Contracts.

(a) The Comptroller General of the United States is authorized and directed to pay directly to laborers and mechanics from any accrued payments withheld under the terms of the contract

any wages found to be due laborers and mechanics pursuant to sections 276a to 276a—5 of this title; and the Comptroller General of the United States is further authorized and is directed to distribute a list to all departments of the Government giving the names of persons or firms whom he has found to have disregarded their obligations to employees and subcontractors. No contract shall be awarded to the persons or firms appearing on this list or to any firm, corporation, partnership, or association in which such persons or firms have an interest until three years have elapsed from the date of publication of the list containing the names of such persons or firms.

(b) If the accrued payments withheld under the terms of the contract, as aforesaid, are insufficient to reimburse all the laborers and mechanics, with respect to whom there has been a failure to pay the wages required pursuant to sections 276a to 276a—5 of this title, such laborers and mechanics shall have the right of action and/or of intervention against the contractor and his sureties conferred by law upon persons furnishing labor or materials, and in such proceedings it shall be no defense that such laborers and mechanics accepted or agreed to accept less than the required rate of wages or voluntarily made refunds.

40 U. S. C. § 270a Bonds of Contractors for Public Buildings or Works; Waiver of Bonds Covering Contract Performed in Foreign Country.

(a) Before any contract, exceeding $2,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such persons, who is hereinafter designated as "contractor":

(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.

(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. Whenever the total amount payable by the terms of the contract shall be not more than $1,000,000 the said payment bond shall be in a sum of one-half the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $1,000,000 and not more than $5,000,000, the said payment shall be in a sum of 40 per centum of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $5,000,000 the said payment bond shall be in the sum of $2,500,000.

(b) The contracting officer in respect of any contract is authorized to waive the requirement of a performance bond and payment bond for so much of the work under such contract as is to be performed in a foreign country if he finds that it is impracticable for the contractor to furnish such bonds.

(c) Nothing in this section shall be construed to limit the authority of any contracting officer to require a performance bond or other security in addition to those, or in cases other than the cases specified in subsection (a) of this section.

(d) Every performance bond required under this section shall specifically provide coverage for taxes imposed by the United States which are collected, deducted, or withheld from wages paid by the contractor in carrying out the contract with respect to which such bond is furnished. However, the United States shall give the surety or sureties on such bond written notice, with respect to any such unpaid taxes attributable to any period, within ninety days after the date when such contractor files a return for such period, except that no such notice shall be given more than one hundred and eighty days from the date when a

return for the period was required to be filed under the Internal Revenue Code of 1954. No suit on such bond for such taxes shall be commenced by the United States unless notice is given as provided in the preceding sentence, and no such suit shall be commenced after the expiration of one year after the day on which such notice is given.

APPENDIX H.

88th CONGRESS 2D SESSION—H. R. 9590

IN THE HOUSE OF REPRESENTATIVES

JANUARY 8, 1964

MR. GOODELL introduced the following bill; which was referred to the Committee on Education and Labor

A BILL

To amend the prevailing wage section of the Davis-Bacon Act to provide judicial review of wage determinations issued by the Secretary of Labor, to provide judicial review of enforcement proceedings instituted by the Secretary of Labor, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act of August 30, 1935, as amended (49 Stat. 1011, as amended; 40 U. S. C. 276 *et seq.*), amending the Act of March 3, 1931 (46 Stat. 1494), is hereby amended by adding at the end thereof the following new section:

"SEC. 8. (a) Any person aggrieved by a wage determination for laborers or mechanics issued pursuant to this Act or to any other Act of Congress, incorporating directly or by reference the prevailing wage provisions of this Act, may obtain judicial review of such determination in an action against the Secretary of Labor and the contracting agency in a district court of the United States praying the court to enjoin the application of such wage determination to the invitation for bids for the advertised contract and to determine the prevailing wage lawfully applicable thereto.

"(b) Notwithstanding any other provision of law, such an action may be brought only in the United States court for the district in which the work is to be performed and shall be commenced within fifteen days after the publication of the advertised specifications containing the challenged wage determination.

"(c) The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure, except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought.

"(d) Pending a final adjudication, the court may issue a temporary restraining order directing the Secretary of Labor and the contracting officer to relieve all bidders from stipulating that they will comply with the specific determination being challenged: *Provided*, That if such order is issued, the court may require any bidder to whom the contract is awarded, to post an indemnity bond sufficient to guarantee the fulfillment of any legal wage obligation, should the challenged determination be ultimately sustained.

"(e) At the conclusion of any hearing on the merits, the court shall, in any case in which it finds that the prevailing wage originally promulgated was not determined in accordance with law, establish such prevailing wage as it deems to be in accordance with law. Such decision by the court shall, within thirty days after its issuance, become effective as the determination of the prevailing wage for the project concerned, unless a petition for review of such decision is filed within such period.

"(f) In carrying out its functions under this section, the court shall have access to all data and material upon which the Secretary of Labor relied in making his original prevailing wage determination, but the court shall accord no presumption of validity to any such determination by reason of any prior administrative finding, act, practice, policy, or rule.

"(g) Any party aggrieved by the decision of the United States district court may appeal such decision by filing within thirty days a petition for review in the United States court of appeals for the circuit within which such district

court is situated. The decision of such court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1524 of title 28 of the United States Code.

"(h) For the purposes of this section, an aggrieved person shall include any contractor, subcontractor, bidder, prospective bidder, labor organization, employee, prospective employee and any contracting agency, public or private, adversely affected by the prevailing wage determination issued by the Secretary of Labor.

"(i) Nothing herein shall be construed to limit the right of the Secretary of Labor at any time to rescind his original determination and to make such adjustments, revisions, or modifications as he deems appropriate."

SEC. 2. Section 7 of such Act is hereby amended to read as follows:

"SEC. 7. (a) Whenever it is claimed that any contractor or subcontractor has refused or failed to pay the wages that he is required to pay by reason of a wage determination issued by the Secretary of Labor pursuant to section 1 of the Act of March 3, 1931, as amended, or pursuant to any other Act of Congress incorporating directly or by reference the prevailing wage provisions of such Act, to employees with respect to whom such determination is applicable, the contracting agency shall promptly notify the contractor or subcontractor of such claim, shall investigate the claim and shall issue a ruling in writing which shall either deny or sustain such claim, and which shall set forth the reasons therefor. No penalties, including the withholding of funds from the contractor or subcontractor, shall be imposed under the terms of Acts to which this section applies prior to such ruling. The contractor or subcontractor against whom the claim is made, and any complaining employee, shall be notified of any ruling made by the contracting officer or any other official designated by the contracting agency, at least twenty days before it is to become effective.

"(b) Any contractor or subcontractor aggrieved or adversely affected by any ruling made pursuant to subsection (a) of this section may bring a de novo action against the United States of America or any contracting agency of the

United States or its officers, in the United States district court for the district wherein the violation is alleged to have occurred. Such contractor or subcontractor may bring an action against a contracting agency of a State in any State court of competent jurisdiction. The court shall grant such relief as is appropriate, and may stay any penalty imposed under the terms of Acts to which this section applies, pending the completion of judicial review.

"(c) Any employee aggrieved or adversely affected by any ruling made pursuant to subsection (a) of this section may bring an action, in the United States district court wherein such violation is alleged to have occurred, or in any State court of competent jurisdiction, against the contractor or subcontractor, or any surety, to recover the amount of unpaid wages due under this Act. Such action shall be subject to the two-year statute of limitations provided by the Portal-to-Portal Act of 1947 (6 Stat. 84; 29 U.S.C. 255). Such employee may maintain such action on behalf of himself and other employees similarly situated, but no employee shall be a party plaintiff to any action unless he gives his consent in writing to become such a party and such consent is filed in the court in which the action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, shall also award reasonable interest on the amount of such judgment. Nothing in this subsection shall confer additional rights on an employee given a right of action on a payment bond pursuant to the requirements of the Miller Act (49 Stat. 793, as amended, 40 U.S.C. 270 et seq.).

"(d) In any action brought pursuant to subsection (b) or (c) of this section, the court shall have authority to determine the obligations of the contractor or subcontractor under the wage provisions of his contract, and whether or not the contractor or subcontractor has failed to comply with them. No presumption of validity shall arise by reason of prior administrative finding, act, practice, policy, or rule.

"(e) Any party aggrieved by the decision of the United States district court may appeal such decision by filing, within thirty days, a petition for review in the circuit court of the circuit within which such district court is

located. The decision of such circuit court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28 of the United States Code.

"(f) The provisions of this section shall be incorporated in, and made a part of, any contract to which this section is applicable."

Supreme Court, U. S.
FILED
NOV 25 1977
MICHAEL RODAK, JR., CLERK

No. 76-1464

In the Supreme Court of the United States

OCTOBER TERM, 1977

THE UNIVERSITY OF CHICAGO AND ARGONNE,
PETITIONER

v.

LOUIS ALLEN MCDANIEL, JR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. MCCREE, JR.,
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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1464

THE UNIVERSITY OF CHICAGO AND ARGONNE,
PETITIONER

v.

LOUIS ALLEN MCDANIEL, JR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed pursuant to the Court's invitation to the Solicitor General to state the views of the United States.

OPINIONS BELOW

The opinion of the court of appeals on remand (Pet. App. B, pp. A2-A12) is reported at 548 F. 2d 689. The initial opinion of the court of appeals (Pet.

App. E, pp. A15-A22) is reported at 512 F. 2d 583. The opinion of the district court (Pet. App. F, pp. A23-A27) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 21, 1977. The petition for a writ of certiorari was filed on April 21, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The United States will discuss the following questions:

1. Whether a federal district court has jurisdiction over a nondiversity action for damages of less than $10,000, based upon a laborer's claim that the private employer for whom he performed services in connection with a government contract paid him at a lesser rate than was specified in the contract.

2. Whether a laborer who has performed services for a private employer in connection with a government contract that does not specify payment of the prevailing wage, as determined by the Secretary of Labor under the Davis Bacon Act, states a cause of action against the employer by alleging that the contract's failure to specify payment of the prevailing wage violated the Davis Bacon Act and that in fact he was paid less than the prevailing wage.

STATUTES INVOLVED

Sections 1 and 3 of the Davis Bacon Act, 46 Stat. 1494, as amended and added, 40 U.S.C. 276a and

276a-2, are set forth at Pet. App. G, pp. A-28-A31.

Section 1 of the Miller Act, 49 Stat. 793, as amended, 40 U.S.C. 270a, is set forth at Pet. App. G, pp. A31-A33.

Section 2(b) of the Miller Act, 49 Stat. 794, as amended, 40 U.S.C. 270b(b), provides:

> Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by him. The United States shall not be liable for the payment of any costs or expenses of any such suit.

STATEMENT

1. The Davis Bacon Act, 46 Stat. 1494, as amended, 40 U.S.C. 276a *et seq.*, requires that all federal contracts in excess of $2,000 for "construction, alteration, and/or repair * * * of public buildings or public works" contain a provision obligating the contractor to pay laborers and mechanics employed thereon not less than the wages prevailing in the locality, as determined by the Secretary of Labor, 40 U.S.C. 276a.[1] The contracting officer is authorized to with-

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[1] If the contracting agency (here, the former United States Atomic Energy Commission, now the Department of Energy;

hold from the contractor a sum sufficient to reimburse the laborers and mechanics for any difference between the wages they actually receive and the locally prevailing wages as determined by the Secretary. 40 U.S.C. 276a.[2] The Comptroller General uses the withheld funds to make necessary reimbursements directly to the covered employees. 40 U.S.C. 276a-2(a).

If the funds withheld are insufficient to make reimbursements in full, laborers and mechanics have the same right of action against the contractor and his sureties as that conferred by the Miller Act, 49 Stat.

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see note 3, *infra*) determines that a proposed contract is subject to the Davis Bacon Act, a wage determination is requested from the Wage and Hour Division of the Department of Labor. (In areas such as Chicago, where there is significant continuing federal construction, the Department of Labor has published wage determinations in the Federal Register that are not tied to any specific contract proposals.) The wage determination is made part of the specifications contained in the request for bids and subsequently is incorporated into the contract.

Contracts governed by the Act provide that any disputes concerning the proper classification of laborers and mechanics or the applicability of the labor provisions of the contract are to be referred to the Secretary of Labor for final determination (41 C.F.R. 9-18.703-1(i)). If the contracting agency has any question regarding the interpretation or application of the Act, such questions may be referred to the Secretary of Labor. There is then a right of appeal to the Wage Appeals Board. See generally Reorganization Plan No. 14 of 1950, 5 U.S.C. App.; 29 C.F.R. 1.1 to 1.16, 5.1 *et seq.*, 7.1 *et seq.*

[2] The Act in addition provides administrative penalties for failure to pay the specified minimum wages, including termination of the contract (40 U.S.C. 276a-1) and debarment of the contractor from future contract awards for a three-year period (40 U.S.C. 276a-2).

793, as amended, 40 U.S.C. 270a *et seq.*, upon persons furnishing labor and materials (40 U.S.C. 276a-2(b)). The Miller Act requires any person entering into a contract exceeding $2,000 for the "construction, alteration, or repair of any public building or public work of the United States" to furnish certain bonds to the United States, including a payment bond for the protection of persons supplying labor or material for use in the contract work (40 U.S.C. 270a (2)). Suits on these bonds may be brought by any person who has furnished labor or material in the performance of the contract and has not been paid in full within a specified time (40 U.S.C. 270(b)(a)).

2. Argonne National Laboratory, a government-owned research and development facility, is operated by the University of Chicago pursuant to a contract with the Department of Energy.[3] The operating contract bars the University from performing construction work of a kind subject to the Davis Bacon Act, and accordingly it contains no requirement that prevailing wages be paid to laborers and mechanics or that a "Miller Act" bond be furnished (see Appendix A, *infra*, pp. 1a-3a). Instead, the contract requires that any construction work be performed under sub-

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[3] The contract was negotiated by the Atomic Energy Commission. The Energy Research and Development Agency ("ERDA") succeeded to the research and development functions of the Atomic Energy Commission in accordance with the Energy Reorganization Act of 1974, 88 Stat. 1233, 42 U.S.C. (Supp. V) 5801 *et seq.* ERDA's functions were transferred to the Department of Energy by the Act of August 4, 1977, Pub. L. 95-91, 91 Stat. 565, Section 301(a).

contracts containing appropriate prevailing-wage provisions and bond requirements (*ibid.*).[4]

Respondent Louis Allen McDaniel, Jr., brought this action for damages in the United States District Court for the Northern District of Illinois, alleging that he represents a class consisting of all mechanics and laborers employed on construction work under the contract for operation of Argonne National Laboratory, that the members of the class have been paid less than the prevailing wages required to be paid by the contract specifications and the Davis Bacon Act, and that the resultant injury to the class exceeds five million dollars. See Complaint, ¶¶ II-IV, pp. 1-3.[5] Jurisdiction was invoked under 28 U.S.C. 1331 and 1337 and the Davis Bacon Act (*id.* at 1).

The district court dismissed the complaint on the ground that the Davis Bacon Act does not authorize a

[4] Determinations concerning the applicability of the Davis Bacon Act to specific types of work are made pursuant to ERDA regulations approved by the Department of Labor (see, *e.g.*, 41 C.F.R. 9-18.701, 9-18.704, 9-18.750).

[5] Although Argonne National Laboratory was named as a defendant, it has no independent legal existence. Respondent has suggested (Memorandum of Law in Opposition to Defendant's Motion to Dismiss, p. 2 n. 1) that he intended in his complaint to identify Argonne Universities Association, one of the parties to the contract between the University of Chicago and the government. There is, in any event, no allegation in the complaint that Argonne has breached any duty to plaintiff, and thus its role in this litigation is at most purely nominal. If the Argonne Universities Association is a party, it has not petitioned for certiorari, and thus is technically a respondent in this Court. For the sake of convenience, however, we use the term "respondent" to refer only to the plaintiff McDaniel.

private right of action by laborers and mechanics against a contractor except on the "Miller Act" bond, stating (Pet. App. F, p. A26):

> [T]here is no way to avoid the thrust of the statute's language and legislative history in delimiting the right of action to one which Congress felt would be adequate to protect employees whose contractors failed to pay them the wages prescribed by the statute.

The court of appeals reversed and remanded (Pet. App. E). The court agreed with the district court that the Davis Bacon Act does not by its terms create a private cause of action (Pet. App. E, pp. A18-A19). However, the court reasoned that the contractual provisions required by the Act create rights for the benefit of the employees, and that those rights may be enforced in civil actions in federal courts otherwise possessing jurisdiction; the court found the requisite jurisdiction here under 28 U.S.C. 1337 (Pet. App. E, pp. A20-A21).[6]

The University of Chicago petitioned for a writ of certiorari, and this Court granted the petition, va-

[6] 28 U.S.C. 1337 provides in pertinent part:

> The district courts shall have original jurisdiction of any civil action * * * arising under any Act of Congress regulating commerce * * *.

The court of appeals rejected respondent's attempt to invoke jurisdiction under 28 U.S.C. 1331, because the complaint did not show that any individual's damages exceeded $10,000 (Pet. App. E, p. A22, n. 5).

cated the court of appeals' judgment, and remanded the case for further consideration in light of *Securities Investor Protection Corp.* v. *Barbour*, 421 U.S. 412, and *Cort* v. *Ash*, 422 U.S. 66 (423 U.S. 810; Pet. App. A, p. A1).

On remand, the court of appeals reaffirmed its earlier decision. After considering the four factors enunciated in *Cort* v. *Ash*, *supra*, 422 U.S. at 78, the court of appeals concluded that laborers and mechanics are the "especial" beneficiaries of the Davis Bacon Act (Pet. App. B, pp. A7-A9); that the Portal-to-Portal Act of 1947, 61 Stat. 84, as amended, 29 U.S.C. 251 *et seq.*, read *in pari materia* with the Davis Bacon Act, evidences congressional recognition of a right of laborers and mechanics to sue in federal courts as third party beneficiaries of the contract provisions required by the latter Act (Pet. App. B, pp. A9-A10); that an implied private right of action is consistent with the congressional purpose underlying the Davis Bacon Act (Pet. App. B, pp. A10-A11); and that an action in federal rather than state court is appropriate since "the right to recover the unpaid portion of the prevailing wages is based on the congressional choice of a federal policy" (Pet. App. B, p. A11). The court remanded the case to the district court for consideration of the merits of respondent's claim, but the court's mandate has been stayed pending this Court's disposition of the instant petition for a writ of certiorari (Pet. App. D, p. A14).

DISCUSSION

This case arises on petitioner's motion to dismiss. Petitioner has not yet answered respondent's complaint (see Fed. R. Civ. P. 12(b)) and thus has not yet controverted his allegations concerning the contract terms. Instead, by its motion to dismiss, petitioner invited the district court to treat all the well pleaded allegations of the complaint as true. See, *e.g.*, *Miree* v. *DeKalb County*, No. 76-607, decided June 21, 1977, slip op. 2, n. 2.

The complaint is susceptible to two different, and mutually exclusive, readings. First, the complaint may be read as alleging that the contract between the government and the University of Chicago contained provisions requiring payment of prevailing wages to laborers and mechanics and that petitioner's failure to pay respondent such wages therefore constituted a breach of a contract of which he was a third party beneficiary (see Complaint, pp. 2, 6, 10). Alternatively, the complaint may be read as alleging that under the Davis Bacon Act the contract was required to include such provisions, and that their omission from the contract constituted a violation of the Act for which respondent was entitled to relief in the form of money damages (see Complaint, p. 2 and Counts III-IV). In our view, under either reading of the complaint petitioner's motion to dismiss should have been granted.

1. The decision of the court of appeals is premised upon the assumption that the first of these two pos-

sible readings of the complaint is correct. The court stated (Pet. App. B, p. A12; emphasis in original):

> [Respondent] allege[s] that the government contract with [petitioner] *did* contain the prevailing wage requirement, and [petitioner] does not deny it. * * * Assuming the facts alleged, the contractor in this case has been unjustly enriched by contracting on the basis of prevailing wage costs, while in fact paying less than the prevailing wage.

Reading the complaint in this light, however, the court's conclusion, "that implying a private right of action in the Davis-Bacon Act is necessary to effectuate the intention of Congress in passing the statute" (*ibid.*), is a *non sequitur*. The complaint so read makes out a claim not under the statute, which has not been violated according to that reading,[7] but under the contract itself. In other words, insofar as respondent alleges that the contract requires payment to him of an amount that he has not yet been paid, his claim is one sounding purely in contract, based

[7] The Davis Bacon Act requires only that contracts for government construction work contain the specified terms. See 40 U.S.C. 276a. If the complaint alleges that the contract does contain those terms, it cannot allege that the Act was violated. The contracting officer may terminate performance of the contract if the wages required by the contract are not paid (40 U.S.C. 276a-1). The complaint does not, however, charge a failure by the contracting officer or agency to terminate the contract, nor does it charge that any federal officer or agency injured respondent in any way.

upon the theory that he was a third-party beneficiary.[8]

Such a claim raises no issue concerning whether Congress established a cause of action, enforceable in a private suit, based upon violations of the Davis Bacon Act. At most, it would present the question whether federal or state common law principles govern the implication of third party rights under a federal contract. Cf. *Miree* v. *DeKalb County*, *supra*, slip. op. 3-8; *Wallis* v. *Pan American Petroleum Corporation*, 384 U.S. 63, 68. But under either view of that question, the federal courts would appear to lack jurisdiction to adjudicate respondent's claim.

Since there is no allegation here of a diversity of citizenship, the absence of federal jurisdiction would be clear if state law determined the scope of third-party rights. But the same result would follow even if federal law controlled. An action based upon the contract, rather than directly upon the Davis Bacon Act, would not be one "arising under any Act of Congress regulating commerce" within the meaning of 28 U.S.C. 1337. Such an action might be said to arise under federal common law and therefore "under the * * * laws * * * of the United States," 28 U.S.C. 1331. But cf. *Phillips Petroleum Co.* v. *Texaco Inc.*, 415 U.S. 125.[9] In any event, the complaint in this

[8] Such a claim would appear to be cognizable in a state court. See *Fata* v. *Healy Co.*, 289 N.Y. 401, 46 N.E. 2d 339; cf. *Bodrick* v. *Mayfair Construction Corp.*, 38 N.Y. 2d 926, 346 N.E. 2d 820.

[9] An employee's claim that he is not being paid the wages specified in his employer's federal contract might also raise a

case fails to satisfy the amount-in-controversy requirement of 28 U.S.C. 1331.[10] The complaint states only that the injury to the entire plaintiff class "is in excess of Five Million Dollars" (Complaint, p. 3). As the court of appeals noted (Pet. App. E, p. A22 n. 5), the claims of the class may not be accumulated to meet the jurisdictional requirement of 28 U.S.C. 1331. The general allegation in the complaint is deficient, for it "give[s] no indication that the amount in controversy with respect to the claim of any single plaintiff exceeds the jurisdictional amount." *Clark* v. *Paul Gray, Inc.*, 306 U.S. 583, 589.[11] Accordingly, if the complaint rested upon the theory attributed to it by the court of appeals, the court should have affirmed the district court's dismissal of the action, for want of jurisdiction.

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variety of questions concerning the interpretation of the contract that would implicate federal rather than state policies. For instance, such questions might require application of Labor Department regulations and determinations relating to such matters as the various classes of laborers and mechanics identified in the applicable wage determination and the circumstances in which the workers are considered to be "employed * * * directly on the site of the work" (40 U.S.C. 276a-1). It may well be that these questions should be considered in federal, rather than state courts.

[10] Section 2 of the Act of October 21, 1976, Pub. L. 94-574, 90 Stat. 2721, amended 28 U.S.C. 1331 prospectively to eliminate that requirement in any action "brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity."

[11] In particular, the complaint does not allege that there are fewer than 500 members in the class.

2. Only the alternative reading of the vague allegations of the complaint, *i.e.*, that in fact the contract omitted any provision for payment of prevailing wages and that its failure to include such a provision violated the Davis Bacon Act, raises any issue concerning an implied right of action under that Act. So read, the complaint in essence challenges the correctness of the contracting agency's determination that the work to be performed under the contract is not construction work of the kind covered by the Davis Bacon Act (see note 1, *supra*), and it seeks *de novo* judicial review of that determination. In our view, such review is not available in an action brought by an employee for back wages for work already performed.[12] We believe that there is no implied right of action in favor of such an employee under the Act.[13]

The factors relevant in determining whether a private remedy is implicit in a federal statute that does not expressly provide such a remedy were set forth

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[12] Since this contract prohibits the performance of construction work by the contractor's employees, respondent would have had no interest in seeking such review before the work was performed. A prior determination that the work to be performed was covered by the Davis Bacon Act would simply have meant that the work would be performed by a subcontractor's employee rather than by respondent.

[13] There are a number of other statutes that require the payment of prevailing wages in government-funded contracts but do not provide any remedy similar to the suit on the "Miller Act" bond available under the Davis Bacon Act. See statutes cited at 29 C.F.R. Part I, Appendix A. We express no view on whether those statutes may be enforced by private suits.

by this Court in *Cort* v. *Ash*, 422 U.S. 66, 78 (emphasis in original):

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted * * * that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or deny one? * * * Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? * * * And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law? [14]

We analyze each of these factors, as they apply to this case, in turn.

a. Both the language of the Davis Bacon Act and its legislative history indicate that laborers and mechanics on federal construction contracts are the "especial" intended beneficiaries of the statute. The committee reports on the Act explain: "The purpose of this measure is to require contractors and subcontractors * * * to pay their employees the prevailing wage rates when such wage rates have been established by private industry." S. Rep. No. 1445, 71st Cong., 3d Sess. 1 (1931); H. R. Rep. No. 2453, 71st Cong., 3d Sess. 1 (1931). In 1935, the Act was amended to provide the enforcement provisions codified in 40 U.S.C. 276a-1 and 276a-2 after a Senate subcommittee reported that "unscrupulous contractors have taken advantage of the wide-spread unemployment among the buildings crafts to exploit labor and to deprive employees of the wages to which they were entitled under the law." H. R. Rep. No. 1756, 74th Cong., 1st Sess. 1 (1935). See also S. Rep. No. 1155, 74th Cong., 1st Sess. 1-2 (1935). In 1964, the Act was further amended to require the Department of Labor to consider fringe benefits in determining the level of prevailing wages. The Senate Report on the proposed amendment states (S. Rep. No. 963, 88th Cong., 2d Sess. 2 (1964)):

> Almost from the inception of Federal construction activity Congress recognized the necessity for providing basic wage protection to local laborers and mechanics employed on the construction. It was precisely for the purpose of providing this protection that Congress passed the Davis-Bacon Act more than 30 years ago.

In *United States* v. *Binghamton Construction Co.*, 347 U.S. 171, 178, moreover, this Court noted: "[o]n its face, the Act is a minimum wage law designed for the benefit of construction workers."

Petitioner correctly notes (Pet. 10) that laborers and mechanics are not the sole intended beneficiaries of the Davis Bacon Act. The Act has the correlative purposes of providing equality of opportunity for local contractors, protecting prevailing living standards of all local craftsmen, and preventing disturbance of the local economy. See H. R. Rep. No. 308, 88th Cong., 1st

[14] These criteria have since been applied by this Court in *Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462, and *Piper* v. *Chris-Craft Industries*, 430 U.S. 1.

Sess. 2 (1963); S. Rep. No. 963, *supra*, at p. 2. However, since these purposes were to be accomplished by "providing basic wage protection to local laborers and mechanics" (S. Rep. No. 963, *supra*, at p. 2), they are not inconsistent with the conclusion that laborers and mechanics are the especial intended beneficiaries of the Act.

Nevertheless, as this Court emphasized in *Securities Investors Protection* v. *Barbour*, 421 U.S. 412, the finding that the primary congressional purpose in enacting the relevant statute was the protection of the plaintiff class is not alone sufficient to raise the implication that Congress intended to grant the members of that class a private right of action. See also *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U.S. 453, 457-458.

b. The Davis Bacon Act contains a number of enforcement provisions, including the specific remedy, which may be invoked by laborers and mechanics such as respondent, of a suit on the "Miller Act" bond required for construction contracts (see pp. 3-5, *supra*). When a statute creates a right and expressly provides a particular remedy or remedies for the enforcement of that right, an appropriate presumption is that the legislature did not intend the implication of other remedies—*expressio unius est exclusio alterius*. See, *e.g.*, *United States* v. *Babcock*, 250 U.S. 328, 331; *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297, 301; *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714, 720; *Brown* v. *General Services Administration*, 425 U.S. 820, 834-835.

While such a presumption "must yield to clear contrary evidence of legislative intent" (*National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, *supra*, 414 U.S. at 458), we have been unable to find such evidence in the legislative history of the Davis Bacon Act or its related statutes.

Instead, the legislative history of the 1964 amendments to the Davis Bacon Act strongly indicates that Congress did not believe the Act then granted any implied right of private action for unpaid wages by employees against employers. As petitioner points out (Pet. 18-19), while the amendments were under consideration, Congressman Goodell proposed a bill, H. R. 9590, 88th Cong., 2d Sess. (1964), which would have amended the Act to provide, *inter alia*, precisely such a private right of action (see Pet. App. H, p. A37). Congressman Goodell sought to have the substance of H. R. 9590 considered in the House debate on H.R. 6041, 88th Cong., 1st Sess. (1964), the bill to amend the Act by defining prevailing wages to include fringe benefits. After extensive debate concerning whether the Davis Bacon Act should provide for judicial review of coverage determinations, the House voted to invoke the parliamentary rule against nongermane amendments, and it refused to consider Congressman Goodell's proposed amendments. 110 Cong. Rec. 1194-1204 (1964). Mr. Goodell then introduced an amendment to provide for judicial review of fringe benefit determinations, and this amendment was defeated. 110 Cong. Rec. 1227-1228 (1964).

The court of appeals rejected petitioner's reliance upon the fate of the Goodell bill (H. R. 9590), mistakenly asserting that the bill "dealt with the narrow issue of judicial review of the Secretary of Labor's determination of prevailing fringe benefits" (Pet. App. B, p. A9; see Pet. App. H, pp. A34-A38). Petitioner, on the other hand, places too much reliance on the Goodell bill when it asserts (Pet. 20) that "[t]he fact that these proposed amendments were rejected by the Congress is compelling evidence that the Seventh Circuit erred." Since H. R. 9590 was never reported out of committee, and the substituted amendment was limited to fringe benefit determinations, Congress did not expressly reject a private action in favor of employees for unpaid wages. However, the invocation of the non-germane rule, which had the purpose of excluding consideration of the merits of H.R. 9590, reflects a conscious decision by House members not to include in the 1964 amendments a provision for judicial review and enforcement by persons either "aggrieved by a wage determination" (Pet. App. H, p. A34) or aggrieved by a contractor's failure to pay "the wages he is required to pay by reason of a wage determination" (Pet. App. H, p. A36).

More significant than the House action itself, however, is the fact that the members participating in the debate preceding the invocation of the non-germane rule stated explicitly their belief that the Davis Bacon Act contemplated no judicial review of agency decisions implementing the Act. The belief necessarily implies that there is no private right of

action by employees to enforce the Act. The disagreement among the participants in the debate was solely over whether the Act should be amended to permit judicial review. See 110 Cong. Rec. 1194-1204 (1964). Congress declined to add such an amendment either then or later. This consideration strongly counsels against judicial creation of a private right of action by implication.

The court of appeals nevertheless found an implied private right of action for the benefit of laborers and mechanics by reading the Davis Bacon Act *in pari materia* with the Portal-to-Portal Act of 1947, 61 Stat. 84, as amended, 29 U.S.C. 251 *et seq.* (Pet. App. B, pp. A1-A10; Pet. App. E, pp. A19-A20). The court particularly relied upon 29 U.S.C. 255, which imposes a two-year limitation on any cause of action for "unpaid minimum wages, unpaid overtime compensation, or liquidated damages" under the Fair Labor Standards Act, the Walsh-Healey Act, or the Davis Beacon Act. Since the Miller Act imposes a one-year limitation on all suits on the contractor's bond (40 U.S.C. 270b(b)), the court reasoned that "[u]nless the Portal-to-Portal two year statute of limitations on Davis-Bacon actions is a nullity," Congress must have contemplated direct suits by employees against their employers to enforce the provisions of the Davis Bacon Act (Pet. App. B, p. A10).[16]

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[16] The court did not suggest any reason why Congress would have intended that, with the possibility of direct access to the courts under the longer statute of limitations in the Portal-to-Portal Act, "by perverse operation of a type of Gresham's

We submit, however, that the court of appeals read too much into the Portal-to-Portal Act. The limitations provision of that Act was not subjected to extensive legislative scrutiny at the time of enactment, and the reference to the Walsh-Healey and Davis Bacon Acts was itself an afterthought. When Congress enacted the Portal-to-Portal Act, it was primarily concerned with curtailing the flood of suits then being brought under the Fair Labor Standards Act after this Court's decision in *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680. See *United States* v. *Unexcelled Chemical Corp.*, 196 F. 2d 264, 268-269 (C.A. 3). The Senate Bill (S. 70) would have amended only the Fair Labor Standards Act "'to exempt employers from liability for portal-to-portal wages.'" S. Rep. No. 37, 80th Cong., 1st Sess. 1, 48 (1947). The House Bill (H. R. 2157) included the Davis Bacon Act and the Walsh-Healey Act; the committee report explained (H. R. Rep. No. 71, 80th Cong., 1st Sess. 5 (1947)):

> The Walsh-Healey Act also concerns itself in its field with minimum wages and overtime compensation. The Bacon-Davis Act has provisions relating to minimum wages and other conditions of employment. These two acts are therefore affected by the Mount Clemens decision. The situation described herein as to the Fair Labor Standards Act applies to that existing under the

laws [40 U.S.C. 276a-2(a)], with its rigorous administrative exhaustion requirements and time limitations, would be driven out of currency" (*Brown* v. *General Services Administration*, *supra*, 425 U.S. at 833).

> Walsh-Healey Act and the Bacon-Davis Act. The same necessity exists there for remedial legislation.

H. R. 2157, 80th Cong., 1st Sess. (1947), contained a one-year statute of limitations, and thus was consistent with the enforcement provisions of the Davis Bacon Act. See 40 U.S.C. 270b(b) and 276a-2(b); H. R. Rep. No. 71, *supra*, at p. 7. In contrast, S. 70, 80th Cong., 1st Sess. (1947), provided for a two-year statute of limitations (S. Rep. No. 37, *supra*, at p. 48). Although the Senate Committee Report on H. R. 2157 agreed to the expanded coverage of the House Bill, it retained the two-year limitation of S. 70. See S. Rep. No. 48, 80th Cong., 1st Sess. 50-51 (1947). The two-year limitation was recommended by the conference committee (H. R. Rep. No. 326, 80th Cong., 1st Sess. 13-24 (1947)) and was enacted (Pub. L. 49, 61 Stat. 68).

There is no evidence that Congress recognized that the new statute created two incompatible periods of limitation under the Davis Bacon Act. To the contrary, it appears that Congress proceeded upon the erroneous premise that "there is no limitation provision in either the Walsh-Healey or the Bacon Davis Acts." S. Rep. No. 48, *supra*, at p. 42. The amendment to the Portal-to-Portal Act was intended simply to correct this asserted deficiency by "setting up a 2-year statute of limitations." *Id.* at 51.[16] This legis-

[16] The Senate debates on the House Bill demonstrate the same unfamiliarity with the Davis Bacon Act. 93 Cong. Rec. 2083 (1947) (Statement of Senator Wiley). Senator Donnell, a subcommittee member, indicated that he did not recall that

lative history lends no support to the conclusion of the court below that Congress assumed the existence of an implied private cause of action to enforce the Davis Bacon Act. It indicates instead that Congress thought that, consistent with the purpose of the Portal-to-Portal Act, it was preventing the bringing of stale suits under existing explicit statutory provisions.

It would, in any event, have been surprising if Congress had assumed the existence of an implied private cause of action under the Davis Bacon Act. That Act's explicit private enforcement provisions incorporated those of the Miller Act (see p. 5, *supra*). The Miller Act in turn derived from the Heard Act (Act of August 13, 1894, 28 Stat. 278). At the time the Miller Act was adopted, the statutory action on

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the Davis Bacon Act had been mentioned in the Senate subcommittee hearings on the legislation. 93 Cong. Rec. 2124 (1947); see also 93 Cong. Rec. 2250, 2253 (1947) (remarks of Senator McGrath). However, the Senate subcommittee agreed with the House subcommittee that the Davis Bacon Act and the Walsh-Healey Act should be included in the Portal-to-Portal Act, as explained by Senator Wherry, "for the simple reason that [they] involve payments for hours worked." 93 Cong. Rec. 2193 (1947).

During the debates, Senator McGrath argued that even a two-year period of limitation was too short, because "the administrative [claim] procedures which are necessary to determine the validity of the workman's claim for back wages under the Davis Bacon Act frequently take a considerable length of time which may very easily run for a period of more than 2 years." 93 Cong. Rec. 2252 (1947). Senator McGrath's statement is significant because it indicates that the limitation in the Portal-to-Portal Act was intended to apply to the explicit statutory remedy provided in the Davis Bacon Act.

the required bond had been held to be the exclusive means of enforcing the Heard Act. See *United States to Use of Zambetti* v. *American Fence Construction Co.*, 15 F. 2d 450 (C.A. 2); *United States* v. *Montgomery Heating & Ventilating Co.*, 255 Fed. 683 (C.A 5); *Strong* v. *American Fence Construction Co.*, 245 N.Y. 48, 156 N.E. 92.[17] After the enactment of the Portal-to-Portal Act, the Miller Act also was so construed. See *Harry F. Ortlip Co. of Pennsylvania* v. *Alvey Ferguson Co.*, 223 F. Supp. 893, 894 (E.D. Pa.); *Gallagher & Speck, Inc.* v. *Ford Motor Co.*, 226 F. 2d 728, 731 (C.A. 7).[18] There is no apparent rea-

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[17] In the latter case, Judge Cardozo stated (245 N.Y. at 52):

> Congress has said that contractors shall be liable to materialmen and laborers in an amount to be made determinate by the giving of the bond. The statutory liability, which in turn is inseparably linked to the statutory remedy, assumes the existence of a bond as an indispensable condition. Till then, there is neither Federal justification nor any right of action that can rest upon the statute.

[18] These decisions merit consideration here because of the parallelism between the Miller and Davis Bacon Acts. The Miller Act requires the contractor to furnish a bond for the benefit of laborers and materialmen on government construction contracts exceeding $2,000, while the Davis Bacon Act sets the minimum wages that the contractors may pay to laborers and mechanics under such contracts. Compare 40 U.S.C. 270a with 40 U.S.C. 276a. The remedy under either Act is the action on the bond provided by 40 U.S.C. 270b (see 40 U.S.C. 276a-2(b)). If a private right of action in favor of laborers and materialmen cannot be inferred from the obligations imposed on contractors under 40 U.S.C. 270a, there is no reason to infer a similar private right of action in favor of laborers

son why Congress would have disagreed with this consistent line of cases, much less why it should have expressed its disagreement covertly in the subtle manner attributed to it by the court of appeals."[19]

c. The Davis Bacon Act requires the contracting agency to include, in the specifications for federal construction contracts, the Secretary of Labor's determination of the prevailing wages for construction workers on similar projects at the locality involved, and to incorporate into the contracts based on these specifications a stipulation that the contractor will pay at least those wages to all mechanics and laborers employed on the site. 40 U.S.C. 276a. The contract must also permit the contracting officer to withhold from the amount due the contractor any amount necessary to assure that such laborers and mechanics are paid at the prevailing rates (*ibid.*). If the amount withheld is insufficient, the laborers and mechanics are granted the explicit right to sue on the payment bond required by the Miller Act (40 U.S.C. 270a) to recover the pre-

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and mechanics from the obligations imposed under 40 U.S.C. 276a, especially since the same facts that render a contract subject to one Act also render it subject to the other (see Pet. App. E, p. A16).

[19] When Congress intended to permit private suits by employees to enforce federal statutory requirements concerning working conditions, it knew how to do so explicitly. See, 29 U.S.C. 216 (Fair Labor Standards Act). The failure to include such an explicit provision in the Davis Bacon Act thus is itself evidence that no such right should be implied. See *Willis* v. *E. I. Du Pont de Nemours & Co.*, 76 F. Supp. 1010 (E. D. Okla.), reversed on other grounds, 171 F. 2d 51 (C.A. 10).

vailing wage specified in the government contract (40 U.S.C. 276a-2(b)).[20]

The Davis Bacon Act thus not only specifies the obligation of the contracting agency and the contractor but also describes the means available to the employee for assuring that he receives the benefits of the Act. By requiring the inclusion of the wage determinations in the specifications, the Act apparently contemplates adjudication of disputes only at the pre-bid stage of procurement activities.[21] Thereafter, the required clauses are included in the contracts and, if the contractor fails to perform his contract obligations, remedies are provided. But nothing in the legislation suggests that Congress intended to permit the disruption of the performance of government contracts by suits challenging the failure to include Davis Bacon Act provisions in the contracts or alleging that incorrect coverage determinations have been made.[22]

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[20] Neither the statute nor the regulations promulgated thereunder provide any administrative remedy in favor of an employee who has been injured by the failure to include the prevailing-wage provisions in a contract.

[21] Unions have been granted standing to challenge the failure to include appropriate prevailing wage determinations in specifications soliciting bids for government contracts. See, *e.g.*, *International Union of Operating Engineers, Local 627* v. *Arthurs*, 355 F. Supp. 7 (W.D. Okla.), affirmed, 480 F. 2d 603 (C.A. 10); *North Georgia Building & Construction Trades Council* v. *United States Department of Transportation*, 399 F. Supp. 58, 63 (N.D. Ga.).

[22] As petitioner points out (Pet. 20-21), Congress clearly intended to preclude judicial review of the Secretary's determinations of prevailing wages. See also *United States* v. *Binghamton Construction Co.*, 347 U.S. 171, 177.

Because of the complexity involved in classifying work entailing the performance of a large number of highly specialized tasks, which cannot be readily categorized as either construction or nonconstruction work under traditional criteria (for example, construction workers and regular maintenance workers may perform the same task interchangeably), and in order to afford a degree of certainty in the contracting process, ERDA, which was a principal government contracting agency,[23] had developed detailed guidelines for determining what work constitutes construction work with in the meaning the Davis Bacon Act. These guidelines, as approved by the Department of Labor, are published in the Federal Register (see note 4, *supra*) and applied by special committees at the contract site.[24]

Permitting a suit by an employee after the contract has been let, and thereby substituting the many federal district courts for the contracting agency as the maker of work-coverage decisions, would substantially disrupt the federal procurement process. The disruption would be most dramatic, of course, if injunctive relief were sought, but it would also be pervasive even where, as here, the claim is simply

[23] When its functions were transferred to the Department of Energy, ERDA had more than 30 contracts for the operation of complex research, development and production facilities. Ten of these contracts involved total obligations since inception of more than one billion dollars each; fifteen involved obligations of between $100 million and $1 billion each.

[24] The Department of Energy reports that ERDA made more than 5,000 coverage decisions under these guidelines in the year before its functions were assumed by the Department.

for wages due for work already performed. For example, if the district court should conclude that respondent was entitled to be paid at the prevailing wage rate for construction workers because he was performing construction work, the contractor and the government must either reclassify similar jobs for the future or face the continued accrual of potential liability for back wages. In turn, reclassification by implication might suggest the necessity for substantial alteration of the coverage guidelines, which would entail very difficult decisions about what work is sufficiently similar to that performed by respondent to require reclassification.[25] Moreover, opening the provisions of existing contracts to judicial scrutiny for compliance with the Davis Bacon Act inevitably will subject the contractors to jurisdictional disputes between unions that represent construction workers and those that represent maintenance or other nonconstruction workers.

Federal budgeting is adversely affected by a determination, after a cost-plus contract has been let, that the higher construction wages must be paid even though such wages were not contemplated when the contract was let.[26] Fixed-price procurement also would

[25] These coverage decisions themselves would be subject to review in other suits, with all the possibilities for conflicting decisions that such review implies. At best, the courts and the agency would be faced with the task of harmonizing a proliferating number of decisions dealing with infinitely varying facts.

[26] Such a determination could easily result in a substantial cost overrun in an operating contract of the size of the one involved here. See note 23, *supra*.

be adversely affected by the possibility of such a determination. The possibility of post-contracting challenges, with the concomitant potential for delays in performance due to court suits, injunctions, and efforts to reach administrative settlements, would significantly increase a bidder's uncertainty about what it would cost to perform the contract. This might discourage potential bidders from competing for government contracts and force higher bids to reflect the possibility of increased costs.

In sum, any implication of a right of action for employees beyond that expressly granted in the Davis Bacon Act can only be at the expense of the efficiency of the government procurement process. The rights explicitly granted in the Davis Bacon Act represent the balance between competing goals that has been struck by Congress. Significant alterations in that balance necessarily would be inconsistent with the scheme Congress has established.

d. The final consideration identified in *Cort* v. *Ash*, *supra*, 422 U.S. at 78, is whether the cause of action asserted is "one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law." An action for the breach of an employment contract is an action traditionally relegated to state law, and we believe, as the district court suggested (Pet. App. F, pp. A26-A27), that the failure to pay mechanics and laborers the prevailing wages required by the terms of a government construction contract could be challenged under state law

by the employees as third-party beneficiaries of the contract (see pp. 9-12, *supra*). But a suit challenging the failure to include a prevailing-wage provision in a contract requires a determination of the scope of the coverage of the Davis Bacon Act, and thereby implicates matters of federal rather than state policy. The precise scope of the congressional directive concerning the wages to be paid workers on federal contracts is not "one traditionally relegated to state law." The state courts evidently agree, for they have consistently declined to take jurisdiction over suits by laborers or mechanics to recover back wages pursuant to the remedies afforded by the Davis Bacon or Miller Acts. See, *e.g.*, *Ybanez* v. *Anchor Constructors, Inc.*, 489 S.W. 2d 730, 738-739 (Texas Ct. of Civ. App.); *Davis* v. *Hardaway Contracting Co.*, 386 S.W. 2d 707 (Ark. Sup. Ct.); *Kelly* v. *Grimshaw*, 161 Kan. 253, 167 P. 2d 627; *A. W. Kutsche & Co.* v. *Keith*, 88 S.W. 2d 454 (Tenn. Sup. Ct.).

In sum, we conclude that two of the four criteria set forth in *Cort* v. *Ash* are met here—*i.e.*, the plaintiff is one of the class for whose "especial" benefit the statute created a federal right, and federal, rather than state, law should control the assertion of that right. However, we do not believe that the remaining two criteria are satisfied: there are significant indications of a legislative intent to make the remedies provided by 40 U.S.C. 276a-2 exclusive, and a private right of action in favor of employees against employers where no wage determination is in the contract would be inconsistent with the legislative

scheme. Accordingly, we believe that if there is a need for a private enforcement action under the Davis Bacon Act, it should be supplied by the Congress and not by the courts."

* * * * *

Because of its significance for federal procurement, the question whether the Davis Bacon Act confers a right of action upon an employee who wishes to challenge the absence of a prevailing wage provision in his employer's contract with the government is an important question of federal law that this Court should decide in an appropriate case. However, it does not appear that that question may fairly be said to be presented by this case; at a minimum, the present posture of the case seems to make it an inappropriate vehicle for the Court's consideration of that question.

Since the decision of the court of appeals was based upon the understanding that respondent sought only to enforce existing provisions of petitioner's contract with the government, that decision stands merely for the proposition that an employee may bring an action for wages that his employer agreed to pay under its contract with the government. We do not here quarrel with that proposition although, as we have indicated

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[27] From the time the statute was enacted in 1931, no court has held that a private cause of action for prevailing wages can be asserted under the Davis Bacon Act when the contract does not contain a provision requiring payment of such wages. Even the court below did not so hold, for it assumed the contract contained such a provision.

(pp. 9-12, *supra*), this particular action appears to be one over which the federal courts have no jurisdiction.[28]

The decision below thus leaves it open to petitioner, upon remand to the district court, to offer its contract into evidence and thereby disprove what both courts below understood to be the factual predicate of respondent's suit (see, p. 10, *supra;* Pet. App. F, A24). Since respondent himself has characterized his complaint as resting upon the claim that the contract requires payment of the prevailing wage (Ct. App. Br. 2), we assume that petitioner would be entitled to summary judgment once the contract is presented to the district court. There seems little reason for this Court to undertake plenary review of the court of appeals' interlocutory decision in these circumstances.

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[28] Reversal by this Court on jurisdictional grounds would have the advantage of eliminating any suggestion that this Court approves the broad and unnecessary discussion below concerning whether the Davis Bacon Act confers a right of action generally. Petitioner has not, however, suggested disposition on the jurisdictional grounds we have discussed herein.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1977.

APPENDIX A

The contract at issue in this case contained the following clauses during the time respondent was a contractor employee [1]:

26.5 *Davis Bacon and Other Labor Provisions for Construction Subcontracts.*

The University and the Commission have agreed upon a procedure under which the Commission will determine when work to be undertaken at the Laboratory Facilities is covered by the Davis-Bacon Act. When it is determined that the Davis-Bacon Act does cover a particular work project, the University shall procure by subcontract the covered work. Any subcontract entered into under this section shall contain the provisions relative to labor and wages required by law to be included in contracts for the construction, alteration and/or repair, including painting and decorating, of a public building or public work. When requested by the Commission, any such subcontract shall be submitted for Commission approval.

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Supplement No. 16, Appendix D.

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D. *Performance of Construction Work*

The University, by engaging subcontractors, will undertake the performance of the following types of construction work:

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[1] Similar or identical clauses are included in the current contract.

1. Work estimated to cost less than $100,000 to be performed at the Du Page County site; [2]
2. Work which, because of its relationship to Laboratory operations, requires unusual safety precautions, extensive security arrangements, or close scheduling to avoid interference with normal activities;
3. Work involving installation of equipment in unique developmental facilities such as reactor experiments and major accelerators, where such work is not included in a general construction contract; and
4. Other work, where the University and the Commission agree that the University shall perform the work.

In situations not covered by items 1 through 4, the Commission will enter into prime contracts for the performance of the construction work. The determination of whether any particular project falls within category 2 or 3 and whether there shall be a change from the normal division of work on any particular project, shall be made by agreement between the University and the Commission.

When the Commission enters into prime contracts for work involving the Laboratory facilities, the Laboratory Organization normally will perform various services to help assure proper performance by the contractor. The University and the Commission will develop for each job

[2] This subsection was amended effective February 15, 1972, to refer to: "General Plant Projects estimated to cost less than $250,000.00 and other work estimated to cost less than $100,000.00."

the procedures to be employed by Laboratory, Commission and other interested parties with reference to construction work for Laboratory facilities.

The University will develop and utilize procedures for the selection of cost-type construction subcontractors which will be in accord with Commission policies.

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